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IN THE

Supreme Court of the United States

FRED DE LA MATA, MANUEL A. CALAS, OSCAR CASTILLA, ISRAEL ABEL, COURTNEY RICARDO ALFORD, HECTOR FERNANDEZ-DOMINGUEZ, JESUS E. CARDONA, JOSE HERMINIO BENITEZ, MINNIE RUTH WILLIAMS, RALPH W. CORKER, HIRAM MARTINEZ, JR., DIOGENES PALACIOS, ENRIQUE FERNANDEZ, STEVEN JOHNSON, FRANCISCO JOSE ARIS, GUSTAVO JAVIER PIRELA-AVILA, ENRIQUE ACOSTA, MILCIADES JIMINEZ, CARLOS A. ZAPATA, JOSE MICHAEL VILARINO, VICTOR LONG, MIGUEL CAMPOS, JOSE VISOZO NARCISCO SUAREZ, OSCAR KARIN, ZAIDA FATIMA BORGE, FRANCIS JOSEPH BRADLEY, JAIME A. DURANGO, NATHANIEL DEAN AND EDWARD BERNARD WILLIAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

For 11 months (November 1992-October 1993), United States District Court Judge K. Michael Moore labored under a conflict of interest and concealed that conflict from the defendants in criminal cases who appeared before him. Specifically, Judge Moore *knew* that he was under criminal investigation by the same government prosecuting those very criminal cases. Neither Judge Moore nor the government disclosed the conflict, as Judge Moore rendered rulings in favor of the government in those criminal cases. When the conflict of interest was fortuitously exposed by the media in 1994, a specially designated federal district judge granted new trials to all affected defendants, concluding that Judge Moore's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The government spent the next five years moving for reconsideration, appealing and seeking rehearing. When the Eleventh Circuit finally heard the case *en banc*, it ruled that although Judge Moore had an irreconcilable conflict of interest, it was too costly in "time and money" to the United States—the party who created and benefiitted from the conflict—to redress Judge Moore's violation of § 455(a) by granting Petitioners new trials or sentencings.

The question presented is:

> When a federal judge has violated 28 U.S.C. § 455(a) by failing to recuse or even disclose that he was under criminal investigation by the government while he was presiding over criminal cases, are defendants in those cases entitled to new trials, regardless of the financial burden on the government?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings who were not listed in the caption of the case:

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioners seek review of the April 19, 1999, *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit, reported at *United States v. Cerceda*, 172 F.3d 806 (11th Cir. 1999) (en banc) (per curiam). *See* Appendix A. That opinion vacated the April 23,

1998, Panel opinion of the Eleventh Circuit, reported at *United States v. Cerceda*, 139 F.3d 847 (11th Cir. 1998) (per curiam). *See* Appendix B. The *en banc* Eleventh Circuit affirmed in part and reversed in part two opinions of Chief Judge William C. O'Kelley, United States District Court for the Northern District of Georgia, sitting by designation in the United States District Court for the Southern District of Florida—his April 10, 1995, unreported order denying the government's motion for reconsideration, *see* Appendix C, and his initial September 9, 1994, opinion, reported at *United States v. Garrudo*, 869 F. Supp. 1574 (S.D. Fla. 1994). *See* Appendix D.

JURISDICTION

This petition has been filed within 90 days of April 19, 1999, the date the Eleventh Circuit filed its *en banc* opinion in *Cerceda*. *See* Supreme Court Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portions of which is set forth below:

> No person shall . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const., Amend. V.

This case also involves the following provision of the United States Code:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

STATEMENT OF THE CASE

A. The Investigation of Judge Moore

In early 1992, K. Michael Moore resigned as Director of the U.S. Marshals Service to assume responsibilities as a federal judge in Miami, Florida. Within months, a federal grand jury in the Eastern District of New York began investigating corruption within the Marshals Service under Moore's tenure. By November 1992, while Judge Moore was presiding over a trial in a criminal case in Miami, the investigation focused on Judge Moore himself, and the government decided it was tactically in its interest to reveal the existence of the investigation to Judge Moore.

On November 11, 1992, agents from the FBI and IRS confronted Judge Moore in a Washington, D.C., hotel room about his having accepted gratuities from the principals of a security company which profited from a multi-million dollar contract with the Marshals Service. They informed him that he was the "subject" of a grand jury investigation and interrogated him about the gratuities—meals, tickets to a Broadway show and sporting events and the use of a limousine. (R85; 83-85.) Judge Moore knew he had not reported any of these gratuities either to the Marshals Service, to law enforcement or on financial disclosure forms required by federal law. (R85; 87-88.) After Judge Moore confessed his conduct to the agents, they served him with a grand jury subpoena for his financial records, including those relating to a purchase of a diamond ring he had made, in cash, with the assistance of a company principal. (R85; 36-37, 93-94, 113.)

With his grand jury subpoena in hand, Judge Moore returned to Miami and continued to preside over criminal

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1 "R—" refers to the consecutively numbered items contained in the Record-On-Appeal below.

cases in which the United States was the prosecutor—some in which the FBI was the investigating agency—as if nothing had happened. He continued to do so for the next eleven months. Holding the Sword of Damocles over Judge Moore's head, the United States was content to stand mute as well, as the Petitioners were one by one convicted and sentenced to prison.

When the federal prosecutor in New York learned that the media was about to expose Judge Moore's connection to the investigation, on October 6, 1993, she notified Judge Moore that he was a "target" of the investigation. (R85: 42.) Even then, Judge Moore did not recuse himself from criminal cases. The anticipated media reports, however, appeared on October 11, 1993 and, four days later, on October 15, 1993, Judge Moore finally recused himself.

B. The Motions for New Trials and Sentencings

In February 1994, the Petitioners—criminal defendants who had appeared before Judge Moore between November 11, 1992 and October 15, 1993—began seeking new trials and sentencings, arguing that Judge Moore's conflict, and concealment of that conflict from the Petitioners, gave at least the appearance that his pro-government rulings in Petitioners' cases were motivated by his need to curry favor with the government in the hope of preventing his own indictment. (R11: 631-1, 11, 18-19.) When all of the judges in the Southern District recused themselves from ruling on the new trial motions, the Eleventh Circuit appointed Chief Judge William C. O'Kelley of the United States District Court for the Northern District of Georgia to resolve the controversy, which eventually grew to involve over 30 defendants in 24 cases. (R12: 687.) While the new trial motions were

pending,[2] the government inexplicably dropped its investigation of Judge Moore.

On September 12, 1994, Judge O'Kelley granted the motions for new trials and sentencings, finding that Judge Moore had violated § 455(a) by not recusing himself after his hotel confrontation with federal agents:

> It seems clear to this court that the average person on the street will believe that if a federal judge is the subject of a pending grand jury investigation, then that individual cannot conduct criminal trial impartially. . . . In fact, while one is a subject and has not yet been indicted, the public could perceive that there is even more temptation to try to avoid the indictment by using whatever influence possible. After an indictment has been issued, it is too late to try to convince the government not to indict.

United States v. Garrudo, 869 F. Supp. 1574, 1581 S.D. Fla. 1994). *See* Appendix D. Judge O'Kelley further ruled that new trials and sentencings were mandated, because of the overriding need to maintain the public's confidence in an impartial judiciary. (R13: 728-19.)

Rather than conduct the new trials and sentencings in 1994, the government moved for reconsideration, demanding the chance to question Judge Moore. On March 6, 1995, Judge O'Kelley gave the government its wish. The government put on *no* testimony or evidence concerning the hardship or cost of retrying any of the cases. Its only witness was Judge Moore, who admitted having received all of the gratuities at issue in the investigation, *i.e.*, the meals, the entertainment, the use of the limousine and assistance in the "cash" purchase of a diamond ring. (R85: 80, 96-97.) Judge Moore admitted that he had

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[2] At least one defendant passed away during the five years in which the government contested the new trial motions.

accepted similar "hospitalities," as he characterized them, from the same company officials on other occasions, including a birthday dinner and a trip by "motor coach . . . up to Kennebunkport." (R85: 118-119.) None of these "hospitalities" was disclosed by Moore in his annual financial reports. Judge Moore, however, remained oblivious to the implications of both his conduct and admissions to the agents and never even considered disclosing the obvious conflict of interest or recusing himself: "The thought never crossed my mind." (R85: 104.)

Judge Moore's testimony "strengthened" Judge O'Kelley's conclusion that new trials were required. (R85: 160.)[3] He subsequently reiterated this conclusion in a written order denying the government's motion for reconsideration. *See* Appendix C. Similar orders were entered in the other cases assigned to Judge O'Kelley, and the government appealed them all to the Eleventh Circuit, where they were consolidated as *United States v. Cereda.*

C. The Eleventh Circuit's Rulings

On April 23, 1998, a unanimous three-judge Panel of the Eleventh Circuit affirmed Judge O'Kelley's finding that Judge Moore violated Section 455(a) by failing to recuse himself following the events in his Washington, D.C. hotel room on November 11, 1992. *Cerceda,* 139 F.3d at 853-55. The Panel also agreed that new trials and sentencings were required to protect "the appearance of justice, impartiality and objectivity so as to 'promote public confidence in the integrity of the judicial process.' "

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[3] Judge Moore's testimony would have supplied the probable cause necessary to indict him on a host of federal felonies, including the illegal receipt of gratuities, mail and wire fraud, false statements and conspiracy. *See* 18 U.S.C. §§ 201(c)(1)(A), 371, 1001, 1341, 1343 and 1346.

Id. at 855, quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n. 7, 108 S.Ct. 2194, 2202 n. 7, 100 L.Ed.2d 855 (1988). However, the government sought and obtained *en banc* review by the entire Eleventh Circuit. At the specific request of the Eleventh Circuit, the Petitioners submitted a comprehensive list of all the discretionary rulings Judge Moore rendered in the government's favor during each of the consolidated cases between November 11, 1992 and October 15, 1993.

On April 19, 1999, the Eleventh Circuit, by an evenly divided (6-6) court, affirmed Judge O'Kelley's conclusion that Judge Moore violated § 455(a) by failing to recuse himself in November 1992. *See Cerceda,* 172 F.3d at 811-12. However, an unidentified majority of the court reversed Judge O'Kelley's and the initial Panel's rulings that vacatur was the appropriate remedy for the violation.

The Eleventh Circuit began by rejecting, without discussion, Petitioners' argument that violations of § 455(a) in *criminal* cases constituted structural error that automatically required new trials and sentencings in the infected cases. *Cerceda,* 172 F.3d at 814, n. 12. The Eleventh Circuit, instead, ruled that the test for whether a remedy would be granted depended upon an application of the three-part test this Court used in *Liljeberg* to determine whether a § 455(a) violation in a *civil* case, caused by a judge who had no actual knowledge of the disqualifying facts, required the granting of a new trial under Fed.R.Civ.P. 60(b)(6). *Id.* at 812. This test requires courts to reconsider: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Liljeberg,* 486 U.S. at 864, 108 S.Ct. at 2205 (numbering added). The Eleventh Circuit mis-

interpreted each prong of the test as favoring the government.

First, although the Eleventh Circuit correctly held that "the party seeking vacatur is not required to prove that the judge's potential bias actually prejudiced it by showing, for example, that certain rulings of the judge were erroneous and that the errors were in some way attributable to the judge's potential bias," *Cerceda*, 172 F.3d at 813, it nonetheless faulted the Petitioners for failing to make precisely such a showing. According to the Eleventh Circuit, the Petitioners failed to show any "particular circumstances" that would indicate "a risk of injustice" to them if relief was denied. Petitioners' comprenensive appendix listing the dozens of adverse (*i.e.*, pro-government) rulings made by Judge Moore during their trials and sentencings was simply ignored. The court then downplayed the violation of § 455(a) and the severity of Judge Moore's conflict of interest, finding that it "was neither egregious nor clear to the judge." *Id.* at 814.

In contrast, the Eleventh Circuit believed that the *government* would suffer an "injustice" if the Petitioners were afforded a remedy, because the government would have to "spend significant amounts of time and money in retrying each of these defendants," thereby "divert[ing]" scarce government resources "from other cases with the ultimate result that some crime will go unpunished." *Cerceda*, 172 F.3d at 814. The Eleventh Circuit also speculated that the government's ability to retry the cases would be "seriously compromise[d]" by the "long delay" consumed by the instant litigation itself. *Id.* at 814-15.

Second, the Eleventh Circuit held that there was no great "risk that the denial of relief will produce injustice in other cases." *Id.* at 815. The reason there were no "other" cases was because the Eleventh Circuit had con-

solidated them all in one proceeding. The Eleventh Circuit also believed that "a protocol" it adopted in 1996—*i.e.*, while the consolidated cases were already pending before it—eliminated the risk of injustice in future cases. *Id.* This "protocol" requires judges under investigation to inform the Chief Judges of their District and Circuit —but *not* criminal defendants or the public—of the investigation. The Circuit judges then decide, in complete secrecy, whether disqualification is necessary. *See* Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Eleventh Circuit in the Event of Arrest, Indictment or Possible Criminal Investigation* (Sept. 5, 1996), quoted in *Cerceda*, 172 F.3d at 815, n. 14. The protocol also contains no sanctions for a judge's violation of these procedures.

Third, the Eleventh Circuit found that *granting* relief to the Petitioners would undermine the public's confidence in the judicial process, since the convictions were "seemingly reached by fair procedures." *Id.* at 816. According to the Eleventh Circuit, the public would not wish the government to "spend substantial amounts of *time and money* retrying these defendants" absent proof of actual prejudice to the Petitioners. *Id.* (emphasis added). "Without any *specific indication* that the *outcome in the trial court could have been tainted by bias*, the public would most likely find it unjust to require the Government to suffer such costs." *Id.* (emphasis added).

D. Statement of the Facts

The relevant facts have been discussed chronologically in the preceding sections and were derived from the evidence presented to Judge O'Kelley on March 6, 1995. *See* Appendices C & D.

REASONS FOR GRANTING THE WRIT

By Upholding Criminal Judgments Rendered By a Judge Who Concealed a Conflict of Interest In Violation of § 455(a), the Eleventh Circuit Has Departed From This Court's Precedents In *Liljeberg*, *Tumey* and *Ward*, Thereby Undermining Confidence In the Integrity of Our Judiciary

In our system of checks and balances, the judiciary serves as a check on an overreaching executive branch. That principle, applied in a criminal case, puts the judge between the government and the citizen accused. It is the independence and impartiality of the judiciary that promises to the individual that his right will be protected from an ill-conceived or vexatious prosecution. That promise cannot be fulfilled if the judge has reason to fear the government, or is beholden to it.

The Petitioners in these consolidated criminal cases were all tried and/or sentenced before a judge who was himself under criminal investigation. The judge and the government knew that; the Petitioners did not. The threat of prosecution for the judge was very real, given all of the circumstances, including the judge's admission that he had engaged in the very conduct that was under investigation. Whether that threat would materialize into an indictment of the judge turned solely on the exercise of prosecutorial discretion. As the government's decision whether to indict the judge hung in the balance, the judge continued to make dozens of discretionary decisions affecting the course of the trials over which he was presiding.

The appearance of partiality would have been troubling enough if the judge had disclosed to all that he was under federal criminal investigation and, then, after hearing from the parties, refused to disqualify himself. Even under those circumstances, we would have questioned the judge's abil-

ity to remain impartial. *Cf. Wheat v. United States*, 486 U.S. 153, 162-64, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (courts may reject a defendant's waiver of his attorney's potential conflict of interest). The appearance of partialiy was exacerbated and, indeed, became intolerable here, because the judge concealed those disqualifying facts from the defendants, while issuing rulings adverse to them.

Where a judge's reputation, life-tenured position and possibly his liberty are at the mercy of the government, this Court must presume that such a judge could not remain impartial *and* that judgments rendered by such a judge in criminal cases where the government is a party are inherently suspect. Such judgments therefore, must be vacated. The Court must, above all else, act to ensure the "fair administration of justice" lest the "very integrity of the judicial system" be eroded. *United States v. Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108-09, 41 L.Ed.2d 1039 (1974). The need to uphold judicial integrity is also the thread that links such disparate doctrines as *stare decisis*, *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), separation of powers, *Mistretta v. United States*, 488 U.S. 361, 397-408, 109 S.Ct. 647, 668-674, 92 L.Ed.2d 583 (1986), the Court's power to excuse procedural defaults under Fed. R. Crim. P. 52(b), *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993), and the discriminatory use of peremptory challenges, *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed. 2d 411 (1991). Not surprisingly, the concern for maintaining judicial integrity and objectivity is the touchstone for the Court's construction of judicial ethics and the very reason for the enactment of 28 U.S.C. § 455(a). *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

"In matters of ethics, appearance and reality often converge as one." *Liteky v. United States*, 504 U.S. 540, 565, 114 S.Ct. 1147, 1162, 127 L.Ed.2d 474 (1994) (Kennedy, J., concurring). *See Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13-14, 99 L.Ed. 11 (1954) ("justice must satisfy the appearance of justice"); *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923) ("justice should not only be done, but should manifestly and undoubtedly be seen to be done"). In *Cerceda*, the Petitioners have received neither the appearance nor the reality of justice. Worse yet, the Eleventh Circuit's *en banc*, published opinion trivializes the importance of maintaining the highest standards of judicial ethics by giving full faith and credit to judgments rendered by a federal judge who concealed a conflict of interest. The only way to assure the "fair administration of justice" in these consolidated criminal cases and to restore confidence in the judiciary is to vacate the judgments in those cases.

A. The Economic Cost to the Government of Providing Retrials In Criminal Cases Does Not Justify the Denial of Relief For a § 455(a) Violation, Especially When the Violation Is Caused By the Government

The Eleventh Circuit has confirmed that a violation of § 455(a) occurred in all of Petitioners' cases and that the United States was both responsible for and benefitted from that violation. Nevertheless, the Eleventh Circuit denied relief based upon a distorted reading of this Court's decision in *Liljeberg*. In *Liljeberg*, a party in a *civil* case filed a motion under Fed. R. Civ. P. 60(b)(6) to be relieved from a final judgment upon learning that the trial judge, during his trial, was—unbeknownst to the judge himself or any party in the litigation—a fiduciary of a university having a substantial financial interest in the outcome of the case. In separate parts of its opinion, this Court addressed whether the judge's conduct violated § 455(a) and, if so, what remedy to impose for that violation.

In Part III of its opinion, this Court held that disqualification is required under § 455(a) if a reasonable person would expect that the judge knew of the circumstances creating an appearance of partiality, even if the judge was not actually conscious of those circumstances. 486 U.S. at 859, 108 S.Ct. at 2202. At the conclusion of this portion of its opinion, this Court indicated that finding a "violation" did not end its inquiry, because:

> [a]s in other areas of the law, there is surely room for *harmless error* committed by busy judges *who inadvertently overlook a disqualifying circumstance.*[9] There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving *forgetful judges.*

Id. at 862, 108 S.Ct. at 2203-04 (emphasis added; footnote omitted).

This Court did not, however, intend its comment about "room for harmless error" to establish a new or special "harmless error" rule for all § 455(a) violations. *Liljeberg*, after all, merely involved a "forgetful" judge who "inadvertently overlook[ed]" a financial conflict involving a fiduciary.[4] Even so, his Court *still* vacated the civil

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[4] The Court emphasized the narrow nature of its "harmless error" exception in footnote 9, recognizing that "[l]arge multidistrict class actions, for example, often present judges with unique difficulties in monitoring any potential interest they may have in litigation." *Id.* at 862 n. 9, 108 S.Ct. at 2203 n. 9. In this connection, the Court cited *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714 (7th Cir. 1986), and *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076, 1080 (D. Ariz. 1981), large class actions in which the trial judges discovered for the first time, well into the litigation, that each of their spouses owned a relatively small amount of stock in a member of the class. These cases actually hinged upon § 455(b)(4) violations involving financial conflict of interest.

judgment and remanded for a retrial to remedy the § 455 (a) violation. The "harmless error" comment thus appears to have been precautionary dictum that, in enforcing § 455 in *civil* cases, inadvertent violations under extenuating circumstances may sometimes be disregarded as harmless.

Judge Moore was not a "forgetful" judge who "inadvertently overlooked" a disqualifying circumstance. He had actual knowledge that he was under criminal investigation by the federal government, but failed to recuse or even disclose this conflict of interest to the criminal defendants appearing before him. Yet, the Eleventh Circuit not only found that Judge Moore's § 455(a) violation was *less* egregious than the "inadvertent" violation in *Liljeberg*, *see Cerceda*, 172 F.3d at 814 & n. 13, it rewarded the government for its concealment of the conflict of interest by distorting the equitable factors mentioned in *Liljeberg* as authorizing a "cost-benefit" analysis in criminal cases. Thus, according to the Eleventh Circuit, relief can be denied defendants in criminal cases for § 455(a) violations where the "time and money" the government must expend in retrials is deemed too great, even though the government's own deliberate conduct caused the conflict and inflated those expenses. *Id.* at 816. This distortion of *Liljeberg* creates numerous anomalies which seriously erode the integrity of the judicial system.

First, the Eleventh Circuit's reasoning produces the absurd result that the availability of a remedy for a § 455(a) violation in criminal cases decreases, rather than increases, with the magnitude of the violation. If Judge Moore and the government had violated only the rights of *a single defendant*, the "cost" of granting relief might have been acceptable. However, since the conduct of Judge Moore and the government violated the rights of so many for so long, *no defendant* obtains a remedy.

Second, the Eleventh Circuit's reasoning means that a defendant's right to a fair trial before a conflict-free judge is conditioned upon how much it costs the government to provide it. "[T]he cost of protecting a constitutional right cannot justify its total denial." *Bounds v. Smith,* 430 U.S. 817, 825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). Providing a criminal defendant with a fair trial is certainly more expensive than providing an unfair one. If the defendant is indigent—as were many of the Petitioners herein—the government must provide him with a plethora of "costly" services, including trial and appellate counsel, *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Douglas v. California,* 372 U.S. 353, 358, 83 S.Ct. 814, 817, 9 L.Ed.2d 811 (1963), trial transcripts, *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), docket fees, *Burns v. Ohio,* 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1029 (1959), and even libraries to ensure "meaningful access" to the federal courts. *Bounds v. Smith,* 430 U.S. at 827, 97 S.Ct. at 1497. Although § 455(a) is only a statute, how "meaningful" will the right of access to the courts be if the judge to whom access is guaranteed is infected by a conflict of interest that is deemed too costly to cure?

Third, the Eleventh Circuit's reasoning rewards, rather than censures the government for its own complicity in creating and exploiting the conflict of interest. If the government had disclosed Judge Moore's conflict in November 1992, the violation would have "cost" the government nothing. Timely disclosure would have precipitated motions to disqualify Judge Moore during the pendency of the grand jury investigation—motions which the Eleventh Circuit has now agreed should have been granted. However, rather than lose the benefit of a conflict-ridden judge, the government remained silent. When the conflict was

discovered in 1994, the government chose to expend its resources for the next five years contesting the violation instead of simply retrying the tainted cases. Yet, in the Eleventh Circuit's review, it is the Petitioners—the only ones in the *Cerceda* litigation who (a) accurately viewed Judge Moore's obligations under § 455(a) and (b) were kept ignorant of the facts giving rise to the § 455(a) violation—who must bear the entire "cost" of the violation. And, the price is beyond measure; they must pay by being adjudicated, sentenced and sent to prison by a judge whose "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

Fourth, the government is not the only party who would "suffer" a "hardship" from the "time and money" needed for retrials. Petitioners suffered a "hardship" by having to expend resources on trials tainted by Judge Moore's conflict of interest in the first instance. Retrials would force them to do so again, just as it would for the government. In this respect, vacatur imposes no greater burden on the government than an ordinary reversal with a remand for a new trial. In both situations, the government loses the initial fruits of its victory, and in both each of the parties bears the costs of retrial. This Court has never used the government's alleged "hardship" in mounting retrials as an excuse to deny relief to criminal defendants for any other type of error committed by the government or, indeed, a trial court. Increasing the burden for *only* a judge's trial error in violating § 455(a) itself raises an appearance that judges are protecting their own.

The Eleventh Circuit's blind misapplication of *Liljeberg* to criminal cases ultimately fails, because the United States in a criminal case is not an ordinary civil plaintiff. A prosecutor "is the representative not of any ordinary party to a controversy, but of a sovereign whose obligation [is] to govern impartiality." *Berger v. United States*,

295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935). The prosecutor's duty, therefore, is to embody the sovereign's goal of securing the fairness and neutrality of the judicial process. "[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" *United States v. Agurs*, 427 U.S. 97, 110-11, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976). A civil plaintiff has no such duties and, therefore, imposing the costs of retrials on a "prevailing" civil plaintiff may, under limited circumstances, be "unfair." *Liljeberg*, 486 U.S. at 868, 108 S.Ct. 2207-07. It is *not* "unfair," however, to impose similar costs on the United States in criminal cases—especially when its own conduct caused the violation at issue.

Under the distorted "cost-benefit" approach employed by the Eleventh Circuit in *Cerceda*, the failure of a judge to recuse—or even to disclose a potentially disabling circumstance to the parties—would have no adverse consequences to either the judge or the government. Future judges in Judge Moore's shoes would have little incentive to disclose a conflict of interest, particularly an embarrassing one. Judicial silence in the face of a criminal investigation would pose no danger to the government, because only "trial errors" would be reviewed, and they will be reviewed anyway. Silence would also present little risk to the judge. If the investigation ever became known, the judge would only have breached a toothless "protocol."

The Petitioners can think of no more dangerous outcome for the judiciary than a construction of § 455(a) that fails to correct an acknowledged violation of judicial ethics. By requiring that a defendant must show "evidence that bias could have tainted the outcome" in order to

obtain relief for a § 455(a) violation, *see Cerceda,* 172 F.3d at 816 & n. 12, the Eleventh Circuit collapses the "appearance" standard into an "actual bias" test. In fact, the Eleventh Circuit's logic, taken to a not-too-distant extreme, would eliminate vacatur as a remedy in *all* complex or expensive cases in which only "appearance" was an issue—a position squarely rejected in *Liljeberg.*

One reason why Section 455(a) focuses on the appearance, as opposed to the fact, of bias, is to avoid problems of proof created by an actual bias standard. However, if a defendant must prove that a judge is actually biased in order to obtain meaningful relief under § 455(a), how is this to be done? Does he call upon character witnesses to testify as to the judge's veracity? Does he subpoena the judge's personal files and records? One can only show actual bias when evidence is adduced thereon and a decision is made based upon the proof. This proof would in all likelihood include but not be limited to the judge's testimony. Who is to sit in judgment on such disputes In the instant case, the mere thought of Judge Moore being a witness caused the entire bench in the Southern District of Florida to recuse themselves and caused Petitioners' counsel to stop short of accusing a sitting federal judge of actual bias.

If proof must be had of actual bias in order to gain relief for an "appearance" violation under § 455(a), defendants will be forced to put judges on trial. In this case, after Judge Moore conceded the historical facts surrounding his receipt of gratuities, Petitioners resisted the urge to attack Judge Moore further. The Eleventh Circuit, however, faulted Petitioners for their restraint. *See Cerceda,* 172 F.3d at 814, n. 12. The Eleventh Circuit's opinion, therefore, will force future litigants to either remain silent in the face of judicial conflicts of interest or to take off the

gloves. Either result will only serve to degrade the integrity of the judicial system.

A fair application of *Liljeberg* mandates reversal in these consolidated criminal cases. After all, *Liljeberg* was only a *civil* case where the judge and the parties were unaware of the conflict, and yet, this Court ordered vacatur. Vacatur is even more appropriate in *criminal* cases where, as here, the judge and the government were aware of the conflict and never disclosed it to the defendants. There is no greater "risk of injustice" than in being sent to prison by a judge tainted by an appearance of partiality. The risk of "injustice in other cases" is inevitable, if courts are unwilling to meaningfully enforce rules of judicial ethics. And, the public cannot but lose "confidence in the judicial process" when judges excuse the ethical improprieties of their brethren as a cost-saving measure for the government.

B. The Eleventh Circuit's Misapplication of *Liljeberg* Creates a Conflict With This Court's "Structural Error" Jurisprudence In Criminal Cases

In criminal cases, this Court has recognized two discrete types of errors requiring different remedies. "Trial error" is subject to "harmless error" review, while "structural defects" require reversal without further review. *See Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 1717-18, 123 L.Ed.2d 353 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 307-10, 111 S.Ct. 1246, 1263-65, 113 L.Ed.2d 302 (1991). A trial error is one that occurs "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. a 307-08, 111 S.Ct. at 1264. A structural defect, on the other hand, affects "the framework within which the trial proceeds, rather than simply an er-

ror in the trial process iself" and, therefore, is not "subject to harmless-error analysis." *Id.* at 309-10, 111 S.Ct. at 1265.

As an example of "structural error" that requires automatic vacatur, this Court in *Fulminante* pointed to where "a judge . . . was not impartial." *Id.* at 309, 111 S.Ct. at 1265, citing *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). "The entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial." *Fulminante*, 499 U.S. at 310, 111 S.Ct. at 1265.

At least in criminal cases, violations of § 455(a) must be considered a form of "structural" error which require reversal without regard for any sort of harmless review. A § 455(a) violation, by definition, must involve extra-judicial facts, *i.e.*, facts wholly apart from those presented to the jury. *Liteky v. United States*, 504 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Moreover, it is impossible to assess the prejudice from a presumptively biased judge, because a biased judge can undermine the entire process:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm . Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that process was impaired.

Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). *See also Bracy v. Gramley*, 81 F.3d 684, 698-99 (7th Cir. 1996) (Rovner, J., dissenting) ("[a] judge who wishes to be tough on the defendant

need not adopt the manner of the Tasmanian Devil to do it"), *reversed,* 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *United States v. Brown,* 539 F.2d 467, 469 (5th Cir. 1976) (per curiam) (appellate review insufficient to cure a violation of § 455(a), because "[t]he record does not reflect the tone of voice of the judge, his facial expressions, or his unspoken attitudes and mannerisms").

The *type* of § 455(a) violation at issue in this case also serves to narrow any distinction between the relief available under the Constitution and § 455(a). Where, as in *Cerceda,* a judge has the type of "conflict of interest" that might cause him to rule against a criminal defendant, the Court has never required a showing of actual bias in order to gain relief. In both *Tumey* and *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), for example, the Court vacated convictions rendered by a mayor who had a financial stake in each fine levied in his court, because the "average man" would believe that the mayor would "forget the burden of proof required to convict" due to the "possible temptation" of an increased salary. *Tumey v. Ohio,* 273 U.S. at 532, 47 S.Ct. at 444. Requiring a showing of actual prejudice in order to gain relief for such a conflict of interest, the Court ruled, "requires too much and protects too little." *Ward,* 409 U.S. at 61, 93 S.Ct. at 83. If "structual error" is found when the "average man" might assume that a judge would give in to the "possible temptation" of a salary increase, surely "structural error" exists in the situation presented in *Cerceda*—where the temptation is not merely a few dollars but the judge's very liberty.

Nor has the Court limited its use of "structural error" to cases involving violations of the Constitution. In *Young v. U.S. ex rel. Vuitton Et Fils, S.A.,* 481 U.S. 787,

107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), the Court held that although judges had the authority to appoint private attorneys as special prosecutors to undertake criminal contempt prosecutions, the attorneys so appointed could not have conflicts of interest, *i.e.*, they could not also represent interested parties. In fashioning a remedy for the improper appointment of such a prosecutor, the Court expressly invoked its "supervisory authority to avoid the necessity of reaching any constitutional issues." 481 U.S. at 810, n. 21, 107 S.Ct. at 2138, n. 21. The Court nonetheless relied on its due process-based precedents, *Tumey*, *Ward* and *Vasquez*, to find the same type of "structural error" as in the analogous judicial-conflict setting. *Id.* at 810, 107 S.Ct. at 2139. As the Court explained:

> [A]ppointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. The narrow focus of harmless error analysis is not being sensitive to this underlying concern. . . . A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. "[J]ustice must satisfy the appearance of justice," [*Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)], and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite. Society's interest in disinterested prosecution therefore would not be adequately protected by harmless error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

Id. at 811, 107 S.Ct. at 2139-40. The Court noted that it took a similar *per se* approach to conflicts of interest of defense counsel. *Id.* at 811, 107 S.Ct. at 2140, quoting *Holloway v. Arkansas*, 435 U.S. 475, 490-91, 98 S.Ct.

1173, 1181-82, 55 L.Ed.2d 426 (1978). Even more so where there is a judicial conflict of interest, as in this case, creating a reasonable question about the judge's objectivity must be deemed "structural error" where vacatur is necessary.

The Eleventh Circuit's ruling in *Cerceda* has exacerbated a split in the circuits concerning the proper construction of *Liljeberg* in criminal cases. Two other circuits, the Fifth and the Tenth, have similarly construed *Liljeberg* as authorizing a new form of "harmless error" inquiry for § 455(a) violations in criminal cases. *See United States v. Jordan*, 49 F.3d 152, 158 (5th Cir. 1995); *United States v. Greenspan*, 26 F.3d 1001, 1006 (10th Cir. 1994). *See also Foster v. United States*, 615 A.2d 213 (D.C. 1992).

The Third Circuit in *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995), however, has correctly eschewed any form of "harmless error" inquiry for § 455(a) violations in criminal cases: "[I]t does not matter that the judge's rulings in the case may have been otherwise defensible, for we are concerned with the appearance of partiality." *Id.* at 576. *Accord Turner v. State*, 114 Nev. 682, 962 P.2d 1223, 1226 (1998) (violation of Nevada's judicial disqualification statute requires "automatic reversal" in criminal cases).

The chilling implications of *Cerceda* and the need to resolve the emerging circuit split concerning the proper construction of *Liljeberg* in criminal cases are compelling reasons to grant this Petition. There is no greater need to maintain the unassailable sanctity of the judiciary and to promote public confidence in the impartialitity and trustworthiness of those who sit on the federal bench than in criminal cases where the judge "is more than a moderator or umpire and has an active responsibility to see

that a criminal trial is fairly conducted." *United States v. Curcio,* 279 F.2d 681, 682 (2d Cir.), *cert. denied,* 364 U.S. 824, 81 S.Ct. 59, 5 L.Ed.2d 52 (1960). Denying Petitioners' relief excuses Judge Moore's conduct and reduces § 455(a) to a "purely ceremonial" or "pretend rule." *United States v. Mechanik,* 475 U.S. 66, 82, 106 S.Ct. 938, 948, 89 L.Ed.2d 50 (1986) (Marshall, J., dissenting) (citations omitted). This Court has a special duty to safeguard against self-serving practices that are likely to diminish rather than promote public confidence in the impartiality of the federal judiciary. The Eleventh Circuit's *en banc* ruling in *Cerceda* does precisely that.

CONCLUSION

The Court cannot allow even one Circuit to put a price tag on justice or the integrity of judges who are responsible for ensuring that criminal defendants receive it. For the foregoing reasons, the Petitioners respectfully request that their Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 95-4628, 95-4610 to 95-4613, 95-4617, 95-4618, 95-4626, 95-4629 to 95-4635, 95-4659, 95-5298, 95-5369, 95-5566, 96-4584, 96-5043 and 96-5067

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ANGEL CERCEDA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

COURTNEY RICARDO ALFORD,
a.k.a. "RICKEY," EDWARD BERNARD WILLIAMS,
a.k.a. "BERNARD," NATHANIEL DEAN,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HECTOR FERNANDEZ-DOMINGUEZ,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JESUS E. CARDONA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CARLOS HERNANDEZ,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOSE HERMINIO BENITEZ, a.k.a "WILLIAM MUNIZ," a.k.a. "EMILIO," HERIBERTO ALVAREZ, ELPIDIO, PEDRO IGLESIAS-CRUZ, a.k.a. "BUDWEISER,"
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MINNIE RUTH WILLIAMS, RALPH W. CORKER,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HIRAM MARTINEZ, JR.,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DIOGENES PALACIOS,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRED DE LA MATA, MANUEL A. CALAS,
OSCAR CASTILLA and ENRIQUE FERNANDEZ,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

STEVEN JOHNSON,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRANCISO JOSE ARIAS, GUSTAVO JAVIER PIRELA-AVILA,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ENRIQUE ACOSTA, MILCIADES JIMINEZ,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CARLOS A. ZAPATA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOSE MICHAEL VILARINO,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

VICTOR LONG, ISRAEL AEL, MIGUEL CAMPOS,
JOSE VISOZO NARCISCO SUAREZ,
and OSCAR KARIN, a.k.a. MAS,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DIOGENES PALACIOS,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ZAIDA FATIMA BORGE, a.k.a. GORDA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRANCIS JOSEPH BRADLEY, a.k.a. FRANK BRADLEY,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JAIME A. DURANGO,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ZAIDA FATIMA BORGE, a.k.a. GORDA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

NATHANIEL DEAN, EDWARD BERNARD WILLIAMS,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

April 16, 1999

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT and HULL, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

These appeals require us to determine whether a judge's failure to recuse himself from criminal cases in which recusal was required necessitates vacating the resulting judgments and sentences. We conclude that, in these cases, it does not.

I.

Judge Michael K. Moore of the Southern District of Florida was notified in November 1992 that he was the subject of a federal grand jury investigation in the Eastern District of New York.[1] Eleven months later, in October 1993, the investigation was reported in two Miami newspapers. Immediately after these stories appeared, Judge Moore recused himself *sua sponte* from all cases in which the United States was a party.

The appellees in these cases are criminal defendants who had been tried and/or sentenced by Judge Moore betwen November 1992 and October 1993. Each moved for a new trial and/or sentencing hearing on the ground that Judge Moore should have recused himself from their cases in November 1992, when he first learned of the investigation, rather than in October 1993, when the investigation became public. The defendants' motions were assigned to Chief Judge William C. O'Kelley of the North-

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[1] The facts of this case are set out more fully in the panel opinion. *See United States v. Cerceda*, 139 F.3d 847 (11th Cir.), *vacated*, 161 F.3d 652 (11th Cir. 1998) (en banc). We therefore present only a brief summary here.

ern District of Georgia,[2] who concluded that Judge Moore should have recused himself in November 1992 and that the appropriate remedy for his failure to do so was vacatur. He therefore granted the motions. The Government appealed, and a panel of this court affirmed. We granted rehearing en banc.[3]

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[2] We refer to him as "Chief Judge," even though he no longer is, because that is the position Judge O'Kelley held at the time he was assigned these cases and entered some of the opinions and orders in them. *See, e.g., United States v. Garrudo*, 869 F.Supp. 1574, 1575 (S.D. Fla. 1994).

[3] As a threshold matter, we must address the jurisdictional issue raised by the two appellees in United States v. Cerceda, No. 95-4628, and United States v. Hernandez, No. 95-4613. In those two cases, Chief Judge O'Kelley ordered a new trial as to sentencing only, and the appellees contend there is no statutory basis for an appeal of such orders. We disagree. Congress has provided the government may appeal from "a decision, judgment, or order of a district court . . . granting a new trial after verdict or judgment." 18 U.S.C. § 3731 (1994). That section provides that its provisions "shall be liberally construed to effectuate its purpose." *Id.* The Supreme Court has said that "the purpose of the section was to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232 (1975); *accord, United States v. Posner*, 764 F.2d 1535, 1538 (11th Cir. 1985) ("it seems clear that [§ 3731] is designed only to prevent government appeals that would violate double jeopardy or interfere with an ongoing trial."). Liberally construing § 3731 to effectuate its purpose, we hold that "a new trial after verdict or judgment" includes a new sentence proceeding.

Cerceda also argues that the government's notice of appeal in his case was untimely, because it was filed more than 30 days after the judgment, and under *United States v. Rogers*, 788 F.2d 1472, 1475 (11th Cir. 1986), the government's timely motion to reconsider did not stop the running of the Fed. R. App. P. d(b) 30-day clock. That is correct, but we overrule that holding in *Rogers* for the reasons the Fifth Circuit gave in declining to adopt it. *See United States v. Greenwood*, 974 F.2d 1449, 1467—69 (5th Cir. 1992). We hold that a timely motion to reconsider does toll the running of the 30-day period for filing a notice of appeal.

II.

We first consider the district court's holding that Judge Moore violated 28 U.S.C. § 455(a) [4] by failing to recuse himself from presiding at the defendants' trials and/or sentencing hearings. *See United States v. Garrudo,* 869 F.Supp. 1574, 1581 (S.D.Fla.1994).[5] The panel opinion affirmed the district court's holding on this issue, but that opinion was vacated when we granted rehearing en banc in this case. *See United States v. Cerceda,* 139 F.3d 847, 852-55 (11th Cir.), *vacated,* 161 F.3d 652 (11th Cir. 1998). Because the judges of the en banc court are equally divided with respect to whether Judge Moore violated section 455(a), the district court's holding on this particular issue is affirmed by operation of law. *See Reshard v. Britt,* 839 F.2d 1499 (11th Cir. 1988) (en banc) (affirming district court's order in its entirety by an equally divided court); *see also Herweg v. Ray,* 619 F.2d 1265 (8th Cir. 1980) (en banc), *rev'd on other grounds,* 455 U.S. 265 102 S.Ct. 1059, 71 L.Ed.2d 137 (1982) (affirming district court's judgment in part by an equally divided court and reversing it in part); *Pennsylvania v. O'Neill,* 473 F.2d 1029 (3d Cir. 1973) (en banc) (affirming district court's order in part by an equally divided court and vacating it in part). The panel opinion remains vacated.[6]

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[4] Section 455(a) states that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1994).

[5] The disposition of the defendants' claims was divided into a number of opinions. *Garrudo,* which involved seven defendants who received new trials, is the only published district court opinion in this case.

[6] By affirming the district court's holding on the violation issue, we are not adopting its reasoning. *Cf. City Nat'l Bank of Miami*

III.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 2205, 100 L.Ed.2d 855 (1988), the Supreme Court applied a three-factor test to determine whether a judicial action taken in violation of section 455(a) should be remedied by vacatur pursuant to Fed.R.Civ.P. 60(b).[2] This test requires a court to consider: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id; see also Parker v. Connors Steel Co.*, 855 F.2d 1510, 1526 (11th Cir. 1988). In determining that it was appropriate to vacate the judgments and/or sentence in the defendants' cases pursuant to Fed.R.Civ.P. 33,[8] the district court cited the *Liljeberg* factors but made no factual findings under any of the factors. Instead, the court simply concluded that "the third factor identified by the

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v. General Coffee Corp., 828 F.2d 699, 703-04 (11th Cir. 1987) (affirmance without opinion does not imply adoption of the trial court's reasoning). The opinion of a district court carries no precedential weight, even within the same district. *See, e.g., State Farm Auto. Ins. Co. v. Bates*, 542 F.Supp. 807, 816 (N.D.Ga. 1982).

[7] Rule 60(b) allows a court to vacate a judgment on the basis of, *inter alia*, "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R.Civ.P. 60(b)(2).

[8] In three of these cases, Chief Judge O'Kelley denied defendants' motions for new trial but granted them new sentencing hearings, on the ground that Judge Moore became a subject of the investigation between the date they were convicted and the date they were sentenced. Notwithstanding representations to the contrary, there were no separate motions for new sentencing hearings based on the section 455(a) violation. (Of course, by denying the motions for new trial while at the same time granting new sentencing hearings. Chief Judge O'Kelley effectively treated the motions for new trial as motions for new sentencing hearings.)

Supreme Court in *Liljeberg* is sufficient by itself to warrant a new trial." *Garrudo*, 869 F.Supp. at 1582. It is appropriate, therefore, for us to consider *de novo* the question of whether vacatur is warranted in these cases. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 556 (11th Cir. 1998) ("A district court by definition abuses its discretion when it makes an error of law.") (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996)). In so doing, we apply the three *Liljeberg* factors *seriatim*.

A.

Our consideration of the first *Liljeberg* factor—risk of injustice to the parties in the particular case—entails a two-element inquiry.[9] A court applying this factor must consider not only the risk of injustice to the parties from any potential partiality or bias on the part of the judge, but also the risk of injustice posed by the remedy of

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[9] When a party requests the remedy of vacatur under Fed.R.Civ. P. 60(b) based on a violation of section 455(a), a court applying the first *Liljeberg* factor should consider as a threshold matter whether the motion was made within a reasonable time. *See* Fed. R.Civ.P. 60(b) (requiring party to file motion for relief "within a reasonable time, and [for certain types of motions] not more than one year after the judgment, order, or proceeding was entered or taken"); *Liljeberg*, 486 U.S. at 868, 108 S.Ct. at 2206-07 (stating that vacatur was appropriate "unless it can be said that respondent did not make a timely request for relief"); *id.* at 869, 108 S.Ct. at 2207 (noting that a delay of ten months between affirmance by the Court of Appeals on the merits and the filing of a motion to vacate "would normally foreclose relief based on a violation of § 455(a)"). The defendants in these cases brought their motions for new trial under Fed.R.Crim.P. 33—a rule that, unlike Civil Rule 60(b), has very specific time limits within which a motion must be filed. It is therefore unclear whether the "reasonable time" requirement of *Liljeberg* applies in the criminal context. Because the Government does not contend that the motions were untimely, however, we do not consider the timeliness of each individual defendant's motion.

vacatur itself. Each of these elements warrants separate exposition.

1.

Under the first *Liljeberg* factor, the party seeking vacatur bears the burden of proving that potential bias on the part of the judge presented a risk of injustice to it. A mere showing that the impartiality of the judge might reasonably be questioned clearly is not sufficient to carry this burden; such a showing follows by definition from a court's finding that the judge violated section 455(a). See *Liljeberg*, 486 U.S. at 862, 108 S.Ct. at 2203-04. On the other hand, the party seeking vacatur is not required to prove that the judge's potential bias actually prejudiced it by showing, for example, that certain rulings of the judge were erroneous and that the errors were in some way attributable to the judge's potential bias. Among other difficulties, such a requirement often would place a court of appeals in the problematic position of determining whether the rulings indicated by the party were in fact erroneous even though the merits of the party's case were not properly before it. These uninformed or ill-considered determinations of error would have drastic consequences for subsequent appellate review of the party's case on the merits, and might have the effect of foreclosing such review altogether.

Instead, the following two considerations should guide the court in determining whether the party seeking vacatur has met its burden of proving that the potential bias on the part of the judge represented a risk of injustice to it. First, the reviewing court should consider whether the party seeking vacatur has pointed to particular circumstances that may indicate a risk of injustice to that party.[10]

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[10] In cases where the Court of Appeals reviews a district judge's challenged actions and affirms them on the merits either before or

Second, the court should consider the seriousness of the violation of section 455(a) that is involved.[11]

Applying these two considerations to the cases before us, we conclude that the defendants have not carried their burden under the first *Liljeberg* factor. In their presentations to the district court in support of their motions for new trial, and in their arguments to this court, the defendants have not pointed out any particular circumstances indicating a risk of injustice to them.[12] With re-

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at the same time it considers whether the judge violated section 455(a), the possibility of a significant risk of injustice is substantially reduced—particularly if the review of the merits was plenary. *See Parker*, 855 F.2d at 1526 (concluding that judge's potential bias presented no risk of injustice to party seeking vacatur because court exercised plenary review over merits in same appeal and concluded that district judge's grant of summary judgment was proper); *see also Air Line Pilots Ass'n, Int'l v. Continental Airlines, Inc. (In re Continental Airlines Corp.)*, 901 F.2d 1259, 1263 (5th Cir. 1990) (reaching same conclusion where district court had previously affirmed challenged orders of bankruptcy court on merits); *but see Liljeberg*, 486 U.S. at 868 & n. 16, 108 S.Ct. at 2207 & n. 16 (recognizing that Court of Appeals panel affirmed on merits over a strong dissent and concluding that "a careful study of [the dissenting judge's] analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues"). All but one of the cases before us today, however, have not yet been subject to appellate review on the merits. The sole exception is *United States v. Cerceda*, 17 F.3d 1439 (11th Cir. 1994), which we affirmed pursuant to 11th Cir. R. 36-1 on March 3, 1994.

[11] *Liljeberg*, 486 U.S. at 859, 108 S.Ct. at 2202, indicates that the seriousness of a section 455(a) violation could be mitigated by proof that the judge lacked knowledge of a disqualifying circumstance, and thus bear on the question of the appropriate remedy.

[12] Instead of making any showing of actual prejudice or the risk thereof, the defendants attempted to prevail on either an automatic vacatur or bias *per se* theory, or by focusing on the third *Liljeberg* factor alone. They were successful with that strategy in the dis-

spect to the seriousness of the section 455(a) violation, we do of course recognize that the district court concluded that there was such a violation, and that this court has affirmed that conclusion by an equally divided court. However, after careful consideration of the totality of the circumstances, we now hold that the violation thus established was neither egregious nor clear to the judge. In arriving at this conclusion, we have considered the totality of the circumstances, including, *inter alia*, the nature of the violation, the egregiousness thereof, the clarity of the violation, and the reasonableness of the judge's lack of awareness that he was in violation of section 455(a).[13]

We leave open the possibility that in a rare case involving an extremely serious violation of section 455(a), a court might find that the party seeking vacatur has carried its burden under the first *Liljeberg* factor, even if the party has pointed to no particular circumstances indicating a risk of injustice. But this is not such a case. Indeed, six of the twelve judges on this en banc court believe there was no violation of section 455(a) at all, but, assuming a violation, would join the other judges comprising the majority on the remedy issue in concluding that the violation was neither egregious nor readily apparent.

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trict court, but not here. While the defendants got the district court to agree they could offer additional evidence on the violation issue if that court ruled against them on that issue, at no time have they been denied an opportunity to offer any evidence about, or otherwise make a showing on, the remedy issue. They never have requested such an opportunity.

[13] By contrast, the violation in *Liljeberg* was inexcusable. *See Liljeberg, id.* at 867, 108 S.Ct. at 2206.

2.

The party opposing vacatur also has a burden to carry under the first *Liljeberg* factor. This party bears the burden of proving that the remedy of vacatur itself poses a risk of injustice to it. *See Liljeberg*, 486 U.S. at 868-69, 108 S.Ct. at 2207 (considering whether it would be "unfair to deprive the prevailing party of its judgment," and finding that "neither [of the prevailing parties] has made a showing of special hardship by reason of their reliance on the original judgment"). In order to determine the risk of injustice that vacatur poses to the Government in these cases, we consider separately the defendants who were granted new trials and those who were granted new sentencing hearings.

We agree with the Government's argument that the remedy of providing new trials to the defendants who have requested them poses a significant risk of injustice to it. The Government certainly would spend significant amounts of time and money in retrying each of these defendants. Resources devoted to retrials in all of these cases would have to be diverted from other cases with the ultimate result that some crime will go unpunished. *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127, 159, 114 S.Ct. 1419, 1437, 128 L.Ed.2d 89 (1994) (Scalia, J., dissenting) ("a retrial will do nothing but divert the [Government's] resources, allowing either petitioner or some other malefactor to go free."). Moreover, the long delay between the defendants' original and new trials could seriously compromise the Government's ability to re-prosecute the defendants effectively. This problem is particularly acute in certain cases. With regard to the case of *United States v. De La Mata*, No. 95-4630, for example, the government would face great hardship if forced to conduct a new trial both because of the complexity of the

case (a 78 count, complex white-collar prosecution the trial of which lasted two-and-a-half months) and because a key Government witness was 84 years old and in bad health at the time of the first trial. It is questionable whether that witness—now well over 90 years old—would be capable of again providing the testimony crucial to the Government's case.

Turning to the defendants who received new sentencing hearing, we note that the monetary and temporal costs to the Government from holding such hearings are relatively low. In addition, the Government has not shown that the lengthy delay between the defendants' original and new sentencing hearing would present a special hardship to it in these particular cases. We conclude, therefore, that the risk of injustice to the Government from granting these resentencing hearings is slight. *See Foster v. United States,* 615 A.2d 213, 220 (D.C.1992); *Belton v. United States,* 581 A.2d 1205, 1215 (D.C.1990).

B.

Next, we examine *Liljeberg's* second factor—the risk that the denial of relief will produce injustice in other cases. This factor weighs in favor of vacating the judgment when so doing would "encourag[e] a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Liljeberg,* 486 U.S. at 868, 108 S.Ct. at 2206. In this case, vacating the defendants' convictions and sentences is not necessary to deter judges from violating section 455(a), because the Eleventh Circuit Judicial Council has already minimized the risk that similar violations will occur in the future. In September 1996, the Judicial Council adopted a protocol that established guidelines for recusal when a judge is notified that he

is the subject or target of a criminal investigation.[14] This protocol should provide substantial guidance to judges who find themselves in a situation similar to that of Judge Moore.

Although the protocol does not completely eliminate the risk that other judges will act as Judge Moore did, the risk that they will do so is low enough that vacating the defendants' convictions and sentences would have only a minimal deterrent effect. Instead, the district court's ruling that Judge Moore violated section 455(a) which we (albeit by an equally divided court) affirm, should sufficiently impress upon judges the need to identify and disclose potential grounds for disqualification. Thus, we conclude that there is little risk that denying relief here will produce injustices in other cases.

C.

Finally, we examine the third *Liljeberg* factor—the risk of undermining the public's confidence in the judicial process. Although every violation of section 455(a) creates a risk that the public will lose faith in the judicial system, vacating the trial court's judgment to rem-

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[14] The protocol states:

> Judicial officers who . . . are informed that they are the subject or target of a federal criminal investigation for a crime that is punishable by imprisonment of one year or more may continue with their criminal and civil dockets and administrative duties until the Judicial Council determines to adopt limitations that the nature of the investigation and charges justify. However, after consultation with other judges of his or her court, the implicated judge may discontinue handling civil, criminal and administrative duties that the judge concludes the nature of the investigation and charges justify.

Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Eleventh Circuit in the Event of Arrest, Indictment or Possible Criminal Investigation* (Sept. 5, 1996).

edy the violation sometimes increases rather than decreases that risk. This is such a case. As noted above, we hold that the section 455(a) violation, found by the district court and affirmed by this evenly divided en banc court, is neither egregious nor clear cut. The closeness of the violation issue, and its lack of clarity to Judge Moore, factors into the public confidence calculus. Moreover, the defendants have failed to establish any significant possibility that they suffered any harm because of the circumstances that under the section 455(a) issue. For these reasons, the public would lose confidence in the judicial process if the judgments were vacated, because the parties and the courts would be forced to relitigate the case even though the proceedings leading to those judgments seemed completely fair.[15]

This conclusion is particularly valid with respect to the defendants who received new trials, instead of new sentence proceedings, because of the significant risk of injustice that the Government would suffer if it is forced to prosecute these defendants a second time. As we discussed above, *see supra* part III.A.2, the Government would spend substantial amounts of time and money retrying these defendants. Without any specific indication that the outcome in the trial court could have been tainted by bias, the public would most likely find it unjust to reuire the Government to suffer such costs. Thus, we con-

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[15] This is especially true when the appellate court has conducted a plenary review of the trial court's judgment—any risk that the trial court's bias tainted the outcome in such a case has been cured by the *de novo* review of the unbiased court of appeals. Thus, the public would lose confidence in the judicial process if the trial court's judgment were vacated because that costly remedy would be unnecessary to ensure fairness to the parties. *See O'Neill v. Continental Airlines, Inc.* (*In Matter of Continental Airlines*), 981 F.2d 1450, 1463 (5th Cir. 1993); *Pfizer Inc. v. Kelly* (*In re School Asbestos Litig*), 977 F.2d 764, 787 (3rd Cir. 1992).

clude that there is an appreciable risk that vacating the defendants' convictions would cause the public to lose confidence in our judicial system.[16]

As for the defendants who received only new sentencing hearings, we also conclude that the public's confidence would be undermined if we required the Government to relitigate the trial court proceedings. Without evidence that bias could have tainted the outcome of the hearings, there is a significant risk that the public would find it unjust to require the Government to expend time and money to conduct these proceedings a second time. This risk is lower than the risk involved in granting the defendants a new trial, because the monetary and temporal costs to the Government to resentence the defendants are lower. *See supra* part III.A.2. However, because a substantial risk remains that vacating the defendants' sentences would undermine the public's confidence, we conclude that factor three weighs against vacatur for the defendants who received new sentencing hearings.

IV.

In sum, the three factors identified by the Supreme Court in *Liljeberg* weigh strongly against vacatur in regard to the defendants who received new trials. First, the defendants have failed to show a risk of injustice to themselves while the Government has demonstrated a signifi-

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[16] We note that this risk is mitigated by the Judicial Council's protocol, discussed above, establishing guidelines for recusal in the event of a criminal investigation. The protocol reduces the likelihood that similar problems will arise in the future. Thus, although the public would most likely believe that vacating the defendants' convictions is unjust, that belief would be mitigated by the understanding it is unlikely that vacating convictions for such reasons will be necessary again, and thus, that the Government will not have to retry fairly convicted defendants in the future.

cant risk of injustice to it should the defendants' convictions be vacated. Second, in light of the recently adopted protocol on the matter, there is little risk that failing to vacate the defendants' convictions in these cases will produce injustice in other cases. Finally, public confidence in the judicial process would be harmed if these convictions—seemingly reached by fair procedures—were vacated, and the Government was required to retry the defendants.

Those same factors also weigh against vacatur, albeit less strongly, in regard to the cases in which Chief Judge O'Kelley granted only a new sentencing hearing. Although the risk of injustice to the Government is less in vacating the defendants' sentences than in vacating the defendants' convictions (because of the lesser burden of prosecuting a new sentencing proceeding as opposed to a new trial), that lesser risk is balanced against a comlete absence of evidence regarding a risk of injustice to the defendants. Therefore, the first factor of the *Liljeberg* test still suggests that the remedy of vacatur is inappropriate. The second factor of *Liljeberg* weighs against vacatur just as strongly in the sentencing context as in the context of the defendants' convictions. Finally, public confidence in the judcial process is eroded (although perhaps to a lesser degree) by the setting aside of a fair sentence just as it is eroded by the setting aside of a fair conviction.

We therefore conclude that vacatur is an inappropriate remedy for the section 455(a) violation in these cases. Accordingly, the orders of the district court granting new trial and/or new sentencing hearing are

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 94-5017, 95-4610 to 95-4613, 95-4617,
95-4618, 95-4626, 95-4628 to 95-4635,
95-4659, 95-5244, 95-5298, 95-5369,
95-5566, 96-4584, 96-5043 and 96-5067

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANGEL CERCEDA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

COURTNEY RICARDO ALFORD,
a.k.a. "RICKEY," EDWARD BERNARD WILLIAMS,
a.k.a. "BERNARD," NATHANIEL DEAN,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HECTOR FERNANDEZ-DOMINGUEZ,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JESUS E. CARDONA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CARLOS HERNANDEZ,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ADOLFO MESTRIL, a.k.a. "EL GORDO," JOSE HERMINIO BENITEZ, a.k.a. "WILLIAM MUNIZ," a.k.a. "EMILIO," HERIBERTO ALVAREZ, ELPIDIO, PEDRO IGLESIAS-CRUZ, a.k.a. "BUDWEISER,"
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MINNIE RUTH WILLIAMS, RALPH W. CORKER,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HIRAM MARTINEZ, JR.,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ANGEL CERCEDA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DIOGENES PALACIOS,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRED DE LA MATA, MANUEL A. CALAS,
OSCAR CASTILLA and ENRIQUE FERNANDEZ,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

STEVEN JOHNSON,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRANCISO JOSE ARIAS, GUSTAVO JAVIER PIRELA-AVILA,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ENRIQUE ACOSTA, MILCIADES JIMINEZ,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CARLOS A. ZAPATA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOSE MICHAEL VILARINO,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

VICTOR LONG, ISRAEL ABEL, MIGRUEL CAMPOS,
JOSE VISOZO NARCISCO SUAREZ,
and OSCAR KARIN, a.k.a. MAS,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JAVIER BONILLA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DIOGENES PALACIOS,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ZAIDA FATIMA BORGE, a.k.a. GORDA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRANCIS JOSEPH BRADLEY, a.k.a. FRANK BRADLEY,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JAIME A. DURANGO,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ZAIDA FATIMA BORGE, a.k.a. GORDA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

NATHANIEL DEAN, EDWARD BERNARD WILLIAMS,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

April 23, 1998

Before TJOFLAT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

This appeal examines the point at which a district court judge being investigated by the grand jury should recuse himself in accordance with Title 28 U.S.C. § 455(a) which requires that a judge disqualify himself "in any

proceeding in which his impartiality might reasonably be questioned." Judge Michael K. Moore was questioned by FBI and IRS agents and served with a grand jury *subpoena duces tecum* as early as November 1992. He continued to try and sentence criminal defendants until October 1993, when he recused himself *sua sponte* from all criminal cases after news reports revealed he was the target of a grand jury investigation. Criminal defendants who had been tried and/or sentenced by Judge Moore between November 1992 and October 1993 moved for new trials and/or sentencing hearings on the grounds that Judge Moore should have recused himself when he first learned that he was being investigated. Judge William C. O'Kelley, then Chief Judge of the Northern District of Georgia, specifically assigned to hear these motions, ruled in favor of defendants, holding that Judge Moore should have recused himself in November 1992.

On appeal, the government argues Judge Moore did not abuse his discretion by not recusing when he first learned he was being investigated, and alternatively, assuming Judge Moore did err in not recusing earlier, Judge O'Kelley abused his discretion in ordering new trials and or sentencing hearings across the board rather than determining whether such action was necessary on a case-by-case basis. Based on the unique facts of this case, found by Judge O'Kelley, we affirm.

On October 11 and 13, 1993, two Miami newspapers reported that the United States Attorney's Office in Brooklyn, New York, was investigating Judge Moore for allegedly accepting gratuities worth thousands of dollars from Central Security Systems, Inc. (CSSI) while he served as Director of the United States Marshal's Service. On October 15, 1993, Judge Moore entered an order *sua sponte* recusing himself from all cases in which the

United States was a party. Those cases were reassigned to other judges in the Southern District.

In early 1994, defendants in 24 consolidated cases who had been tried and/or sentenced before Judge Moore between November 11, 1992 and October 15, 1993, prior to his recusal, filed motions for new trials and/or new sentencing hearings. These defendants argued that under Title 28, U.S.C. § 455(a), Judge Moore should have recused himself from all cases involving the United States as early as November 1992 when he was first interviewed by the agents from the FBI and IRS and served with a grand jury *subpoena duces tecum.*

Chief Judge O'Kelley of the Northern District of Georgia was assigned to hear the recusal motions. In orders entered on September 12, 1994, Chief Judge O'Kelley held that Judge Moore should have recused himself in November 1992 and as a prophylactic remedy ordered new trials and/or sentencing hearings. One of these orders, in the case of *United States v. Garrudo*, is reported at 869 F.Supp. 1574 (S.D.Fla.1994).

The government moved for reconsideration, challenging both the court's determination that Judge Moore should have recused himself earlier and the court's broad-brush remedy. Judge O'Kelley conducted an evidentiary hearing during which Judge Moore was the sole witness subject to thorough examination and cross-examination. About one month after the evidentiary hearing, Chief Judge O'Kelley entered orders denying the government's motion. Judge O'Kelley made additional findings of fact and reiterated his earlier conclusion that "an objective law observer knowing all the facts on November 11, 1992, could conclude that Judge Moore's impartiality could be compromised." Regarding the remedy, Judge O'Kelley stood by his determination that new trial and/or sentenc-

ing hearings were required. The government filed numerous appeals in our Court challenging Judge O'Kelley's orders. Because the cases evolved from the same set of operative facts and raised the same core substantial issue, we granted government's motion to consolidate and have before us now 24 appeals for review.

The parties have brought to our attention a few procedural points which need to be addressed.

First, two of the defendants, Angel Cerceda and Carlos Hernandez, moved to dismiss the government's appeal on the ground that federal law did not grant the government the right to appeal from orders granting new sentencing hearings. The government need a specific statutory authority to appeal in a criminal case, which authority is contained in 18 U.S.C. § 3731. *See United States v. Scott,* 437 U.S. 82, 84-85, 98 S.Ct. 2187, 2190-91, 57 L.Ed.2d 65 (1978) (discussing the enactment of § 3731 to provide government appeals in criminal cases). Section 3731 does not expressly provide for government appeals from orders granting new sentencing hearings. The issue, not heretofore decided by this Court, is whether section 3731, a statute that provides it should be liberally construed to effectuate its purposes, can be so construed as to authorize this appeal. For the purpose of this case, unique on its facts, we assume without deciding that the government has statutory standing to appeal. We find this appropriate here where the jurisdictional law is uncharted, our resolution of the jurisdictional question would not affect the outcome in favor of the defendants, and the decision here reached does not develop or change the law.

Second, the timeliness of the government's cross-appeal in the *Cerceda* case has been raised. We exercise our discretion to disregard any procedural irregularity under the circumstances of this case.

Third, because of the administrative handling of this case in the consolidation of cases for consideration of the decision of Judge O'Kelley to order resentencing in all cases tried before, but sentenced after, November 1992, Cerceda's appeal from the decision not to grant a retrial of his case, tried before November 1992, has never been briefed. By separate order we are setting a briefing schedule on Cerceda's appeal, the case to be presented to this panel upon the completion of briefing.

The Need for Recusal

The government contends that Judge O'Kelley failed to consider numerous significant and uncontroverted facts and misapplied the applicable legal standard in deciding that Judge Moore should have recused himself.

Section 455(a) states: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The standard under § 455(a) is an objective one, focusing on a hypothetical reasonable observer. The test of whether to recuse is one of objective reasonableness, that is, whether "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *United States v. Torkington,* 874 F.2d 1441, 1446 (11th Cir.1989); *see also Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 859-60, 108 S.Ct. 2194, 2202-03, 100 L.Ed.2d 855 (1988). A judge is under an "affirmative, self-enforcing obligation to recuse himself *sua sponte* whenever the proper grounds exist," and is required to resolve any doubts in favor of disqualification. *United States v. Kelly,* 888 F.2d 732, 744 (11th Cir. 1989).

We found no case with similar facts upon which we can rely for direction. Both parties have cited to several recusal cases to support their opposing positions, all of which are solid authority for the general principles we have discussed but factually inapposite. *See, e.g., United States v. Jaramillo,* 745 F.2d 1245, 1248 (9th Cir.1984) (judge indicted while presiding over criminal trial properly recused under § 455(a)), *cert. denied,* 471 U.S. 1066, 105 S.Ct. 2142, 85 L.Ed.2d 499 (1985); *In re United States,* 666 F.2d 690, 695 (1st Cir.1981) (fact that district court judge had close relationship with governor and defendant, a former state senator, was chairman of legislative committee that investigated governor and was reportedly helpful and fact that judge had been involved to some extent in that investigation no basis for recusal); *Laxalt v. McClatchy,* 602 F.Supp. 214, 217-18 (D.Nev. 1985) (magistrate judge not disqualified under § 455(a) from hearing pretrial proceedings in action brought by United States Senator to whom magistrate had unsuccessfully applied for apointment as district judge). We agree with the Tenth Circuit's assessment that "cases within § 455(a) are extremely fact driven 'and must be judged on [their] unique facts and circumstances more than by comparison to situations considered in prior jurisprudence.'" *Nichols v. Alley,* 71 F.3d 347, 351 (10th Cir. 1995) (quotation omitted).

In applying this standard, we look to the objective facts in the record that might reasonably lead an objective observer to question Judge Moore's impartiality. Judge Moore confirmed that he was told on or about November 11, 1992, that he was the subject of a pending jury investigation in the Eastern District of New York. On that day, an FBI special agent and an IRS agent interviewed Judge Moore and served him with a grand jury *subpoena duces tecum* seeking his bank and credit card records. Judge Moore testified that the interview concerned CSSI.

On or about November 18, 1992, Nicholas Pastoressa, the former president of CSSI, a company that contracted with the United States Marchal's Service for the provision of security in federal courthouses at various location, entered a plea of guilty in the United States District Court for the Eastern District of New York, to a charge of having conspired to pay bribes and illegal gratuities to persons in the U.S. Marshal's Service. Pastoressa's plea and other information about the case were carried by a major news wire service and printed in the *New York Times,* which has a substantial circulation in Dade and Broward counties, and the *Los Angeles Times* between November 19 and November 24, 1992.

Judge Moore had both a business and social relationship with Pastoressa. Judge Moore testified that during his tenure at the Marshal's Service, he accepted certain gifts and refused others offered by Pastoressa and his associate John Caldera. He testified that prior to the meeting with the agents, he had some knowledge that CSSI was under investigation, but he was uncertain as to the specifics.

The basis for the government's allegation of error is that Judge O'Kelley failed to impute all the necessary knowledge to the hypothetical reasonable observer assessing the appearance of impartiality, which the government specifies as:

> —a detailed knowledge of the workings of a grand jury investigation, including the significance of the fact that prosecutors in Florida would play no role in an investigation that originated in New York,
>
> —knowledge of the contents of the Assistant United States Attorney's Manual, and the distinction the manual makes between the "subject" of an investigation (someone who knows something about the in-

> vestigation) versus a "target" (a person to whom the prosecutor or the grand jury has substantial evidence linking that person to the commission of a crime),
>
> —facts pertaining to the status of the CSSI contracts in controversy when Judge Moore became director of the Marshal's Service, specifically that the contracts with the Service were already in place and that Judge Moore was not involved in the renewal of those contracts.
>
> —knowledge that Judge Moore complied with a grand jury *subpoena duces tecum*, freely responded to the agent's questions without a lawyer, was told at that interview that he was not a target but considered a subject, did not recall being read his rights, and did not contact a lawyer after that meeting.

Judge O'Kelley correctly declined to accept this depiction of the "disinterested, lay observer." The facts put forth by the government pertain to Judge Moore's subjective knowledge and assessments he may have made based on his specific knowledge. Such knowledge may be relevant to the question of actual bias, but the concern underlying section 455(a) is not whether the judge is actually biased but simply whether it might appear so. *Liteky v. United States*, 510 U.S. 540, 548-50, 114 S.Ct. 1147, 1154, 127 L.Ed.2d 474 (1994).

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest

> in the case or because the judge is pure in heart and incorruptible.

Liljeberg, 486 U.S. 860, 108 S.Ct. at 2203 (quotation omitted).

Judge O'Kelley kept the analysis away from the technical knowledge as to the differences between a subject or target of an investigation or subjective facts known only to Judge Moore.

The government relies upon the policy of the Judicial Conference of the United States and the Eleventh Circuit Judicial Council's protocol for its argument that a judge is not required to recuse automatically until he has been identified as a target of an investigation. This policy and the established protocol were adopted a few years after the events at issue here. In its report dated September 19, 1995, The Judicial Conference of the United States agreed to

> urge each circuit judicial council to adopt a mandatory self-reporting rule that requires federal judges to inform their respective chief judge, on a confidential basis, whenever they have been indicted, arrested, or informed that they are the target of a federal or state criminal investigation for a crime which is subject to punishment by imprisonment of one year or more.

Judicial Conference Report at 87.

On September 5, 1996, the Eleventh Circuit Judicial Council adopted a protocol concerning recusal of judicial officers that provides:

> Judicial officers who are implicated in a federal criminal process by way of arrest, or who are informed that they are the subject or target of a federal criminal investigation for a crime that is punish-

> able by imprisonment of one year or more may continue with their criminal and civil dockets and administrative duties until the Judicial Council determines to adopt limitations that the nature of the investigation and charges justify. However, after consultation with other judges of his or her court, the implicated judge may discontinue handling civil, criminal and administrative duties that the judge concludes the nature of the investigation and charges justify.

While both provisions make clear that a judge must take some action when that judge becomes a target of an investigation, reading them to be consistent with the relevant statutes, they do not bar a requirement for recusal at an earlier point should the facts and circumstances so dictate.

Nor do we find dispositive a recent opinion interpreting Standard 3. In *In re Lopez-Lukis*, a panel of this Court held that "the refusal of a district court judge to recuse himself from every criminal case on his docket if he is under criminal investigation by the Department of Justice is not a clear abuse of discretion or usurpation of judicial power warranting mandamus relief." 113 F.3d 1187, 1188 (11th Cir.1997). The panel noted, however, that there was nothing about the facts and circumstances in that particular case that would make it so. 113 F.3d at 1188. Each case must turn on its own unique facts.

The Remedy for Failure to Recuse

The government contends Judge O'Kelley's grant of new trials and/or sentencing hearings in every case was too drastic and suggests instead that the factors enunciated in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), be applied on a case-by-case basis to determine whether there

was evidence of bias in the trial record or some explicit connection between the alleged errors and the appearance of bias.

The Court in *Liljeberg* provided a three-part test to determine whether a section 455(a) violation should relieve a party from final judgment. A court must determine *first*, "the risk of injustice to the parties in the particular case," *second*, "the risk that the denial of relief will produce injustice in other cases," and *third*, "the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864, 108 S.Ct. at 2205.

The decision as to a remedy here was based solely on the third factor in *Liljeberg*, and emphasized the importance of protecting the appearance of justice, impartiality and objectivity so as to "promote public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 858, n. 7, 108 S.Ct. at 2202 n. 7. As the district court noted, "this case is an extraordinary circumstance and, with this decision as precedent, should not occur again. Although the finality of judgment is to be preserved, in this instance the court cannot run the risk that the reputation of the justice system may be tarnished." On this basis, we affirm the court's orders granting new trials and/or sentencing hearings.

The government argues that one of the cases, *United States v. De La Mata*, No. 95-4630, must be analyzed differently from the rest. The case involved a 70-count indictment relating to bank fraud and racketeering that took about two-and-a half months to try. Jury selection began on October 19, 1992, and the jury returned its verdicts on December 30, 1992. The trial had completed its 15th day when Judge Moore met with FBI and IRS agents on November 15, 1992. The government is concerned with double jeopardy problems should we affirm

in this particular case because had Judge Moore recused himself in November 1992, he would have had to declare a mistrial. First, double jeopardy is not a concern when determining whether the standards for recusal under section 455(a) have been met. *Kelly*, 888 F.2d at 746. Second, a judge's proper exercise of discretion to recuse himself satisfies the manifest necessity requirement, thereby permitting a retrial. 888 F.2d at 746.

A thorough reading of Judge O'Kelley's decision, based on the record before him under the standard of review available on review, reveals that the judgment appealed is due to be affirmed. The purpose of this opinion is to affirm the findings and the application of law in Judge O'Kelley's opinion, based on the record that he had before him. It is not intended to extend or limit the decision that he made and the reasons for it.

Various motions have been carried with the case. The government's motion for the Court to take judicial notice of appellate briefs filed in the *Lopez-Lukis* case is denied. The defendants' request that this Court take judicial notice under Fed.R.Evid. 201 of the criminal informations filed against Nicholas Pastoressa, Anthony Manfre, and John Caldara, principals of CSSI, which they attached to their brief as Appendix Two is denied. The defendant Fred DeLaMata's motion, filed under seal seeking to supplement the record or for the Court to take judicial notice of letters submitted by the government in support of sentencing reductions for Pastoressa, Manfre and Caldara, is denied.

AFFIRMED.

APPENDIX C

[Filed Apr. 10, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 90-241-CR-
(HIGHSMITH) O'KELLEY

UNITED STATES OF AMERICA

v.

HIRAM MARTINEZ, JR.

Case No. 91-413-CR-
(HOEVELER) O'KELLEY

UNITED STATES OF AMERICA

v.

ANTONIO GARRUDO, VICTOR LONG, ISRAEL ABEL,
MIGUEL CAMPOS, JOSE VISOZO, MARCISCO SUAREZ,
and, OSCAR KARIN a/k/a MAS

Case No. 91-681-CR-
(ROETTGER) O'KELLEY

UNITED STATES OF AMERICA

v.

ADOLFO MESTRIL, JOSE HERMINIO BENITEZ,
HERIBERTO ALVAREZ, and ELPIDIO PEDRO IGLESIAS-CRUZ

Case No. 91-693-CR-
(ZLOCH) O'KELLEY

UNITED STATES OF AMERICA

v.

COURTNEY RICARDO ALFORD, NATHANIEL DEAN, and,
EDWARD BERNARD WILLIAMS

Case No. 91-704-CR-
(ROETTGER) O'KELLEY

UNITED STATES OF AMERICA

v.

HECTOR FERNANDEZ-DOMINGUEZ

Case No. 91-915-CR-
(DAVIS) O'KELLEY

UNITED STATES OF AMERICA

v.

ANGEL CERCEDA

Case No. 91-6180-CR-
(CONZALEZ) O'KELLEY

UNITED STATES OF AMERICA

v.

MINNIE RUTH WILLIAMS and RALPH CORKER

Case No. 92-230-CR-
(MARCUS) O'KELLEY

UNITED STATES OF AMERICA

v.

FRED DE LA MATA, MANUEL A. CALAS,
OSCAR CASTILLA, and ENRIGUE FERNANDEZ

Case No. 92-301-CR-
(UNGARO-BENAGES) O'KELLEY

UNITED STATES OF AMERICA

v.

STEVEN JOHNSON

Case No. 92-573-CR-
(GRAHAM) O'KELLEY

UNITED STATES OF AMERICA

v.

GUSTAVO JAVIER PIRELA-AVILA and
FRANCISCO JOSE ARIAS

Case No. 92-6023-CR-
(GONZALEZ) O'KELLEY

UNITED STATES OF AMERICA

v.

CARLOS HERNANDEZ

Case No. 93-1-CR-
(GRAHAM) O'KELEY

UNITED STATES OF AMERICA

v.

ENRIQUES ACOSTA and MILCIADES JIMINEZ

Case No. 93-31-CR-
(GRAHAM) O'KELLEY

UNITED STATES OF AMERICA

v.

CARLOS ZAPATA

Case No. 93-72-CR-
(MARCUS) O'KELLEY

UNITED STATES OF AMERICA

v.

JOSE MICHAEL VILARINO

ORDER

The captioned cases are before the court for consideration of the government's motion for reconsideration in each of the fourteen cases enumerated above. This court, sitting by designation, entered orders in these fourteen cases on September 9, 1994. In each case either a new trial or new sentencing was ordered.[1] In order to facilitate resolution of this unusual matter, the court conducted an evidentiary hearing on March 6, 1995. In light of that hearing, and the legal arguments set forth by the parties in their respective briefs on the issue, the court declines to grant the government's motion for reconsideration.

FACTS

Inasmuch as the issue presented in these cases are extraordinarily fact-specific, it is necessary to present a detailed recitation of the facts surrounding the decision to grant new trials and sentencings which precipitated the pending motion. The court is mindful that much of this factual background was articulated in the September 9

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[1] Those cases in which only a resentencing was ordered are *Cereeda*, 91-915-CR-DAVIS and *Hernandez*, 92-6023-CR-GONZALEZ. The defendants in the other twelve cases were granted new trials.

orders,[2] but it is important to reiterate those facts, in addition to providing amplification based on the testimony heard at the March 6 hearing. The Honorable Michael Moore, United States District Judge for the Southern District of Florida, was the sole witness at the March 6 hearing.

Judge Michael Moore commenced his tenure as a United States District Judge for the Southern District of Florida in February 1992, after having served for approximately two years as the Director of the United States Marshals Service. The government concedes that as of November 11, 1992, Judge Moore was the subject of a pending grand jury investigation in the Eastern District of New York involving the alleged receipt of gratuities by individuals at the United States Marshals Service. The government produced a letter from an Assistant United States Attorney in Brooklyn, New York, dated December 8, 1993, which indicates that Judge Moore was told on or about November 11, 1992, that he was the subject of a pending grand jury investigation in the Eastern District of New York. The letter was sent from Julie Copeland, A.U.S.A., Eastern District of New York, to William Keefer, Executive Assistant United States Attorney, Southern District of Florida. As set forth in that letter, on November 11, 1992, FBI Special Agent Thomas Cavanagh and IRS Criminal Investigator James Reilly spoke with Judge Moore about the investigation while Judge Moore was attending a conference in Washington, D.C. The conversation occurred in Judge Moore's Washington hotel room. The agents interviewed Judge Moore and served him with a grand jury subpoena *duces tecum*. The

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[2] For the purpose of convenience, the court will hereinafter refer to the order in the *Cereceda* case, 91-915-CR-DAVIS, when referencing all of the September 9 orders. Other than the particular names and dates in each case, the orders were functionally identical in their substantive content.

subpoena sought Judge Moore's bank and credit card records. Judge Moore confirmed the accuracy of this letter with his testimony. Judge Moore further testified that much of the discussion at the hotel meeting concerned Central Security Systems, Inc. ("CSSI") (*see infra*). Prior to the meeting with the agents he had some knowledge that CSSI was under investigation, but he was uncertain as to the specifics. Judge Moore testified that subsequent to the interview he did not consider recusal because he did not believe that there were any allegations of wrongdoing forthcoming against him.

On or about November 18, 1992, Mr. Nicholas Pastoressa, the former president of CSSI, a company which, *inter alia*, contracted with the United States Marshals Service for the provision of security in federal courthouses at various locations, entered a plea of guilty in the United States District Court for the Eastern District of New York, to a charge of having conspired to pay bribes and illegal gratuities to persons in the U.S. Marshals Service responsible for contracting for the use of security in public buildings around the United States. Newspaper articles about Mr. Pastoressa's plea of guilty and other leads in the case were carried by the Reuters News Service, *The New York Times*, the *New York Law Journal*, the *Los Angeles Times*, and *New York Newsday* between November 19 and November 24, 1992.[3]

Judge Moore was acquainted with Mr. Pastoressa on both a social and business basis. At some point prior to

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[3] *See* Michael Weber, *Giuliani Judges Backed Ex-Cop's Courts Contract*, *New York Newsday*, Nov. 22, 1992, at 23; Ronald J. Ostrow, *Man Pleads Guilty in Marshals Service Bribery Conspiracy*, *Los Angeles Times*, Nov. 20, 1992, Part A, at 30; Ronald Sullivan, *S.I. Businessman Admits Bribing U.S. Marshals Employees*, *New York Times*, Nov. 20, 1992, Sec. B, at 3. The New York Times has a substantial circulation in Dade and Broward Counties.

the November 1992 meeting with the FBI and IRS agents, Judge Moore was aware—through information given to him by someone in the U.S. Marshals Service—that allegations had been made against CSSI. He also testified that he knew that the investigation was being conducted by an outside agency. Significantly, the Judge testified that during the course of his tenure at the Marshals Service he had received certain gifts from Mr. Pastoressa and his associate, a Mr. Caldera. Judge Moore considered these expressions of "hospitality" to be motivated by his friendship with these individuals. One particular gift discussed in some detail, was the provision of a limousine ride and tickets to a Mets game and the broadway show Cats during a trip by Judge Moore and his family to New York in the summer of 1989 or 1990. In conjunction with the same vacation, Judge Moore refused airfare and a complimentary room at the Plaza hotel. The gratuities did not appear on Judge Moore's 1990 financial disclosure form. At some point while in New York, Judge Moore met with CSSI officials. He also went with the CSSI people to see their operations at a courthouse and to have a photo opportunity with then Mayor David Dinkins. Judge Moore testified that the New York trip was also the subject of some discussion at the FBI/IRS interview in Washington, D.C. At this interview, the Judge suggested that he could understand how other people could misconstrue his relationship with the principals at CSSI.

Judge Moore was told on or about October 6, 1993, that his status had changed to that of a target of the grand jury's investigation. He was informed by a telephone call from an A.U.S.A. in Brooklyn, who informed the Judge that he would be named as a target of the grand jury investigation and that their office anticipated that an article would appear to that effect in the press.

This was the Judge's first significant contact with the government on the matter since the Washington meeting which had been eleven months earlier.[4] Judge Moore recalled being shocked when he learned of this information. On October 11, 1993, the *Miami Daily Business Review* printed a front page article which revealed that Judge Moore was under investigation by the U.S. Attorney's Office in Brooklyn for accepting gratuities worth thousands of dollars from officials of CSSI. Daniel Klaidman, *S. Florida Federal Judge Being Investigated, Miami Daily Business Review*, Oct. 11, 1993, at 1. On October 13, *The Miami Herald* ran a similar article detailing the investigation. Tom Dubocq, *Federal Judge Faces Gift-Taking Probe, The Miami Herald*, Oct. 13, 1993, Part B at 1. On October 15, 1993, Judge Moore entered an order, *sua sponte*, recusing himself from all cases in which the United States was a party, both civil and criminal. Judge Moore testified before the grand jury without immunity on November 2, 1993. The Brooklyn investigation has since concluded, and no indictment was sought or obtained against Judge Moore. Judge Moore has since resumed his full duties as a United States District Judge.

Each defendant premised their motion for a new trial and/or sentencing on the theory that Judge Moore should have recused himself from presiding at the contested proceeding because he was the subject of an investigation by the government, and therefore his impartiality had, at the very least, the appearance of being compromised. Although Judge Moore ultimately recused himself on October 15, 1993, the defendants argue that the recusal

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[4] In the interim, Judge Moore had at one point contacted an A.U.S.A. in Brooklyn to inform the U.S. Attorney's office (E.D.N.Y.) that he was unable to locate certain travel records from the period in which he was the director of the Marshals Service. There was no discussion as to the status of the investigation.

should have occurred immediately after the initial meeting with the FBI and IRS agents in November of 1993. Title 28 U.S.C. § 455 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his *impartiality might reasonably be questioned.*

Id. (emphasis added). This statute is the nucleus of each defendant's motion.

As indicated, this court previously ordered new trials and/or sentencings in each of the above captioned cases, and the government has moved the court to reconsider those orders. The following legal analysis shall explain why, particularly in consideration of the testimony and argument presented at the March 6 hearing, the court is compelled to affirm its prior decisions and thus deny the government's motion.

LEGAL ANALYSIS

Motions for reconsideration are not to be filed as a matter of course. In fact, the term "motion for reconsideration", as such, does not appear in the Federal Rules of Civil Procedure. The title of FED. R. CIV. P. 60(b), under which a so-called motion for reconsideration may be brought, further attests to its extraordinary nature ("Relief From Judgment or Order—Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc."). "[Rule 60(b)] is 'properly invoked where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship' . . . ." *Mohammed v. Sullivan*, 866 F.2d 258, 260 (8th Cir. 1989) (*quoting Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987)). The motion should be reserved for certain limited situa-

tions, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice. *See, e.g., Kern-Tulare Water District v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). In the cases *sub judico* the government appears to be proceeding under a synthesis of the two former bases. Having set for the legal nature of this motion, the court may now apply the governing law to the facts of this case.

Significantly, neither the government's memorandum of law in support of their motion nor anything presented at oral argument suggests that there has been any intervening development in the controlling law which would alter the court's original finding. Thus, the government has sought to persuade the court that its initial assessment of the law was erroneous. To that extent, it is important to recapitulate the primary legal conclusions of the court's initial orders.

It is not disputed that the governing standard in adjudicating Judge Moore's propriety in presiding over the proceedings at issue is 28 U.S.C. § 455(a). That standard concisely instructs that "[a]ny . . . judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This affirmative command has been interpreted to require a judge to recuse him or herself if "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989). *See also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-860 (1988).

The standard was not always weighted so strongly in favor of recusal. As noted in the court's original order:

> Congress amended Section 455 approximately fifteen years ago in order to eliminate the 'duty to sit' doctrine which had previously required a judge to hear a case absent a clear demonstration of bias or prejudice. *United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982) section 455(a) [as amended] puts the judge under a self-enforcing obligation to recuse himself where legal grounds exist for disqualification. *Torkington*, 874 F.2d at 1446; *United States v. Jaramillo*, 745 F.2d 1245 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).

Cerceda, Order at 5. This change in controlling standards is significant. In so amending § 455(a), Congress was expressing a clear desire to shift the perspective from a subjective to an objective one. This change had the effect of placing a much higher premium on the public perception of impartiality.

A further testament to the objective nature of the § 455(a) recusal standard, is the fact that scienter is not required in order to substantiate a violation of § 455(a). *Liljeberg*, 486 U.S. at 859. "Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section." *U.S. v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). The United States Supreme Court, emphasizing the objective nature of the inquiry, has held that "it is critically important in this kind of case to identify the facts that might reasonably cause an objective observer to question [the Judge's] imparitality." *Liljeberg*, 486 U.S. at 865.

Lastly, insofar as a legal analysis § 455(a) is concerned, the court must note the deliberate use of the word

"shall" within its text. Thus, if a judge finds that he, when viewed in an objective light, has the appearance of impropriety he must (*not* should) recuse himself from the matter at hand. This court placed great weight on this fact in its original order:

> Section 455(a) focuses on the *appearance* of impartiality, as opposed to the existence in fact of any bias or prejudice. The statute does not give a judge discretion as to whether to recuse himself but states that a judge "*shall* disqualify himself in any proceeding in which his impartiality might be questioned." 28 U.S.C. § 455(a) (emphasis added). . . . [T]he statute tells him to disqualify himself if the public may perceive him, or his rulings, as being affected. *See U.S. v. Kelly*, 888 F.2d 732, 744-45 (11th Cir. 1989). . . . Section 455(a) requires judges to resolve any doubts they may have as to whether they should hear a case in favor of disqualification.

Cerceda, Order at 15 (emphasis added).

Applying the onerous legal standard articulated above, the court was compelled to conclude that all of the defendants in the above captioned cases were entitled to new trials and/or sentencings. The court was not, and is not, persuaded by the government's argument that because Judge Moore was merely a "subject" of a grand jury investigation as of November 11, 1992 (the date of the Washington, D.C. meeting) that recusal was not required. Notwithstanding Judge Moore's familiarity with the subject/target/witness distinctions in the grand jury context, as set forth in the United States Attorneys' Manual, it cannot be credibly argued that these distinctions are readily apparent to the average lay person. These nuanced distinctions, quite often treated as a matter of

semantics even among legal professionals who are acquainted with their usage, are easily lost on one not intimately familiar with the pre-indictment machinations of the federal criminal justice system.

The court is unable to accept the government's contention that "the term 'subject' cannot be divorced from the definition in the United States Attorneys' Manual." Government's Motion for Reconsideration at 9. To the contrary, the term "subject" must be divorced from that context. The United States Attorneys' Manual, a procedural guidebook for attorneys in that office, can hardly be said to be the document upon which members of the public objectively evaluate the conduct of the judiciary. The court agrees with the standard postulated by the government in its motion. "The test is whether an objective, disinterested, lay observer *fully informed of the facts underlying the grounds on which recusal was sought* would entertain a significant doubt about the judge's impartiality." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (emphasis added) (citation omitted). The concept of "fully informed", though, does not embrace technical legal manuals used by practitioners in conducting their trade. Rather, it contemplates an understanding of the underlying factual circumstances surrounding a particular judge's case. Without repeating the facts set forth above, the court is confident that an objective lay observer, knowing the facts on November 11, 1992, could conclude that Judge Moore's impartiality might be compromised. The court is even more comfortable with this decision than at the time of the original orders, having heard detailed testimony from Judge Moore regarding his relationship with the principals of CSSI. At the very least, these circumstances create an *appearance* of impropriety, and that is all that is needed. "The very purpose of § 455(a) is to

promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 406 U.S. at 865. Again, "when a judge harbors any doubts concerning whether his disqualification is required he should resolve the doubt in favor of disqualification." *Parker*, 855 F.2d at 1524 (citations omitted).

Lastly, while it is possible for a judge's failure to recuse himself to be deemed a "harmless error", *see, e.g., Parker*, 855 F.2d at 1525, the court does not believe the cases *sub judice* fall within that category. The Supreme Court has determined that the following considerations must be analyzed in fashioning a remedy for a violation of § 455(a): "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 846 (emphasis added). It is the third consideration referenced in *Liljeberg* which is of paramount importance in these cases. As the Court observed, "[w]e must continuously bear in mind that 'to perform its high function in the best way justice must satisfy the appearance of justice.'" *Liljeberg*, 486 U.S. at 864 (*quoting In re Murchison*, 349 U.S. 133, 136 (1955) (citations omitted)).

This principle, the protection of the appearance of justice, impartiality and objectivity, is essential not only to maintain public confidence, but also as the foundation of the legitimacy of an independent judiciary. The judicial branch has neither the power of the purse enjoyed by the legislative branch nor the powers of enforcement enjoyed *by* the executive branch. The ability of the judiciary to function as a coequal branch within the confines of our tripartite federal system is directly rooted in the willingness of the public—and the other two branches—

to accept the authority of its decisions. That acceptance, in turn, is dependent on a well grounded faith in the fairness of the manner in which that authority is exercised. Any act or event which threatens that faith cannot stand unchallenged. While the court is not unmindful of the expenditures that this decision may cause the government to incur, the risks to the federal judicial system at large, were the court to rule to the contrary, far outweigh any costs imposed by a decision adverse to the government in these particular cases.

Accordingly, after careful consideration of both fact and law, the government's motion for reconsideration is hereby DENIED. Each of these fourteen cases may now be returned to the appropriate judge in the Southern District of Florida for ultimate resolution of these matters.

IT IS SO ORDERED this 4th day of April, 1995.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge
Sitting By Designation

APPENDIX D

UNITED STATES DISTRICT COURT
S.D. FLORIDA
MIAMI DIVISION

Crim. No. 91-413-cr

UNITED STATES OF AMERICA

v.

ANTONIO GARRUDO, VICTOR LONG, ISRAEL ABEL, MIGUEL CAMPOS, JOSE VIZOSO, NARCISO SUAREZ, and OSCAR KARIN

Sept. 9, 1994

ORDER

O'KELLEY, Chief Judge, sitting by designation.

The captioned case is before the court on the defendants' motion for a new trial. Other motions similar to this motion has been filed by defendants in other criminal cases tried by Judge Moore. The judges to whom these cases were assigned have recused themselves from deciding the motions for new trials. The case was designated to the undersigned judge, by the Honorable Gerald Bard Tjoflat, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, on May 25, 1994.[1] After

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[1] Judge Tjoflat has designated a total of 14 cases to this court, all of which involve motions for new trial. The legal arguments

today's order, the clerk can return this case to the judge assigned the case in the Southern District of Florida. Currently, there are some outstanding motions for release pending the new trial. These motions are best dealt with by the Southern District of Florida judges. The trial in this case began before Judge Michael Moore on or about July 19, 1993, and concluded on August 13, 1993. The defendants were found guilty of various charges related to the possession of cocaine. None of the defendants has been sentenced.

Factual Background

Judge Moore entered duty as a United States District Judge for the Southern District of Florida in February 1992, after having served for approximately two years as the Director of the United States Marshals Service. Each defendant seeks a new trial on the theory that Judge Moore should have recused himself pursuant to Title 28 U.S.C. § 455(a) from presiding at defendant's trial.

On or about November 18, 1992, Mr. Nicholas Pastoressa, the former president of Central Security Systems, Inc., a company which manufactured metal detectors, entered a plea of guilty in the United States District Court for the Eastern District of New York to a charge of having conspired to pay bribes and illegal gratuities to persons in the U.S. Marshals Service responsible for contracting for the use of security in public buildings around the United States. Newspaper articles about Mr. Pastoressa's plea of guilty and other leads in the case were carried by the Reuters News Service, The New York Times, the New York Law Journal, the Los

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are all similar, and the orders will be similar in that respect. The cases are all criminal ones which were tried before Judge Moore sometime in 1992 or 1993.

Angeles Times, and New York Newsday between November 19 and November 24, 1992.[2]

Eleven months later, on October 11, 1993, the Miami Daily Business Review printed a front page article which revealed that Judge Moore was under investigation by the U.S. Attorney's Office in Brooklyn for accepting gratuities worth thousands of dollars from officials of Central Security Systems. Daniel Klaidman, S. Florida Federal Judge Being Investigated, Miami Daily Business Review, Oct. 11, 1993, at 1. On October 13, The Miami Herald ran a similar article detailing the investigation. Tom Dubocq, Federal Judge Faces Gift-Taking Probe, The Miami Herald, Oct. 13, 1993, Part B at 1. On October 15, 1993, Judge Moore entered an order sua sponte recusing himself from all cases in which the United States was a party.

At the June 24, 1994 status conference held before this judge, the government admitted that Judge Moore was under investigation by the federal government as early as November 11, 1992. The government turned over a letter from the prosecutor in Brooklyn, New York, dated December 8, 1993, which indicates that Judge Moore was told on or about November 11, 1992, that he was the subject of a pending grand jury investigation in the Eastern District of New York. Letter from Julie Copeland, Assistant United States Attorney, Eastern District of New York, to William Keefer, Executive Assistant, United

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[2] See Michael Weber, Giuliani, Judges Backed Ex-Cop's Courts Contract, New York Newsday, Nov. 22, 1992 at 23; Ronald J. Ostrow, Man Pleads Guilty in Marshals Services Bribery Conspiracy, Los Angeles Times, Nov. 20, 1992, Part A, at 30; Ronald Sullivan, S.I. Businessman Admits Bribing U.S. Marshals Employees, New York Times, Nov. 20, 1992, Sec. B, at 3. The New York Times has a substantial circulation in Dade and Broward Counties.

States Attorney, Southern District of Florida (Dec. 8, 1993). On November 11, 1992, FBI Special Agent Thomas Cavanagh and IRS Criminal Investigator James Reilly spoke with Judge Moore about the investigation while Judge Moore was attending a conference in Washington, D.C. The agents interviewed Judge Moore and served him with a grand jury subpoena duces tecum. Judge Moore was told on or about October 6, 1993, that his status had changed to that of a target of the grand jury's investigation. Judge Moore testified before the grand jury without immunity on November 2, 1993. The investigation in New York has now concluded, and so indictment was sought against Judge Moore. Judge Moore has since resumed his full duties.

The defendants base their motions for new trial on the theory that Judge Moore should have recused himself from presiding at their trial because he was the subject of an investigation by the government. See 28 U.S.C. § 455(a). Although Judge Moore recused himself on October 15, 1993, defendants allege that the recusal should have occurred on November 11, 1992, eleven months earlier. As their trial occurred between July 19 and August 19, 1993, the difference in recusal dates is significant. Title 28 U.S.C. § 455 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned (emphasis added).

This part of the U.S. Code is the focal point of all of the defendants' motions for new trial.

Legal Analysis

I. Standard for Recusal

The government and the defendants agree that the standard for determining whether a judge should recuse is § 455(a); however, they reach different conclusions when they apply the standard. A judge should recuse himself when "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-860, 108 S.Ct. 2194, 2202-03, 100 L.Ed.2d 855 (1988).

Congress amended Section 455 approximately fifteen years ago in order to eliminate the "duty to sit" doctrine which had previously required a judge to hear a case absent a clear demonstration of bias or prejudice. *United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982). Section 465(a) puts the judge under a self-enforcing obligation to recuse himself where legal grounds exist for disqualification. *Torkington*, 874 F.2d at 1446; *United States v. Jaramillo*, 745 F.2d 1245 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2142, 85 L.Ed.2d 499 (1985). The standard is no longer a subjective one but is now objective.

> Congress hoped that this objective standard would promote public confidence in the impartiality of the judicial process by instructing a judge, when confronted with circumstances in which his impartiality could reasonably be doubted, to disqualify himself and allow another judge to preside over the case.

Liljeberg, 486 U.S. 847, 870-71, 108 S.Ct. 2194, 2207-08, (Rehnquist, C.J., dissenting) (footnote omitted).

Scienter is not required in order to find a violation of § 455(a). *Liljeberg*, 486 U.S. at 859, 108 S.Ct. at 2202. "Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section." *U.S. v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). From the letter written by the prosecutor and submitted by the government in this case, it is clear that Judge Moore knew he was the subject of an investigation. Thus, even though scienter is not required, Judge Moore's knowledge of his status as a subject of the investigation is not in dispute.

A. Government's Argument

The government's argument hinges on the interpretation of two words: subject and target. The government concedes that as of November 11, 1992, Judge Moore was the subject of a pending investigation in another federal district. The government then contends that Judge Moore knew from his own background as a prosecutor and United States Attorney that a "subject" is "a person whose conduct is within the scope of the grand jury's investigation." United States Attorney's Manual § 9-11.150 (hereinafter "USAM"). In contrast to that definition, a "target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence of

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[3] The dissent in Liljeberg found this standard to be unworkable. "A judge considering whether or not to recuse himself is necessarily limited to those facts bearing on the question of which he has knowledge." *Liljeberg*, 486 U.S. at 872, 108 S.Ct. at 2208-09 (Rehnquist, C.J., dissenting). The dissent did not believe that "constructive knowledge" should be the basis for a violation of § 455(a).

bias linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." USAM § 9-11.150. The government contends that to inform someone he is a subject of a grand jury investigation is to tell him virtually nothing of his status or of his likelihood of being named as a defendant.

The government also argues that Judge Moore's status in relation to the New York investigation would not have changed in any way because of the outcome or his rulings in any criminal cases in Miami. The United States Attorney's Office for the Southern District of Florida is recused from any aspect of the New York investigation under provisions of the United States Attorney's Manual. See USAM § 9-3.400. The government alleges that Judge Moore was "undoubtedly well aware" that the United States Attorney's Office for the Southern District of Florida would have had no knowledge, input, or control over the Eastern District of New York's grand jury investigation. The government concludes this line of argument by stating that any allegation of bias or conflict is implausible. The defendants respond that the government's claim that there is no bias is an appropriate response when recusal is sought under § 455(b), but has no merit in a case controlled by § 455(a). Under § 455(a), "what matters is not the reality of bias or prejudice, but its appearance." *Liteky v. United States*, 510 U.S. 540, ——, 114 S.Ct. 1147, 1154, 127 L.Ed.2d 474 (1994).

In *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987) overruled on other grounds by *United States v. Watson*, 866 F.2d 381, 385, n. 3 (1989), an attorney in the case was under investigation by the same United States Attorney's Office prosecuting his client. The court held that this situation created a conflict of interest and ordered the case retried for this, as well as other, reasons. The government contends that the Miami situation is

different because the United States Attorney's Office conducting the investigtion of the Marshals Service was in New York while the criminal cases were tried with United States Attorneys in Florida. Furthermore, the ultimate charging decision was made by the United States Attorney for the Eastern District of New York. The United States Attorney for the Southern District of Florida had no input into that decision. The Florida office maintains that it did not even know of the investigation until October 1993. Accordingly, the government argues, no amount of favor curried by the trial judge with the defendants' prosecutors could possibly have been of any help to Judge Moore in the resolution of the New York investigation. The government contends that Judge Moore, by virtue of his long service as a United States Attorney and as an Assistant United States Attorney, would be aware that the Florida office could not become involved in the New York grand jury inquiry.

B. Defendants' Argument

The defendants contend that because Judge Moore was a subject of the grand jury investigation during the time of their respective trials, then the average citizen would certainly conclude that Judge Moore's "impartiality might reasonably be questioned." 18 U.S.C. § 455(a); *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989) (test for recusal based on the impression of an objective lay observer). The government agrees that the standard is that of a "lay observer." The defendants argue that the government cannot rely on the distinction between being a subject versus a target of an investigation. At least one defendant characterizes this argument over terminology as "hypertechnical distinctions only sophisticated attorneys, experienced in federal criminal practice, could possibly understand. . . ." See Defendant's Reply

to Government's Response to Defendant's Motion for a New Trial, *United States v. Abel*, 91-413-CR-Hoeveler, p. 2.

The defendants argue that being a subject of an investigation includes the individual within a category of suspects who possibly have criminal culpability and exposure. The person who is a subject of the investigation is no longer a witness whom the government may wish to interview. The defendants allege that the terminology "subject" is used rather than "target" merely until the government has enough evidence to support a change in status. In fact, at least one defendant argues that at the time an individual is a subject he is more likely to feel the need to cooperate with the government so as to avoid becoming a target, a status that can frequently lead to an indictment.

The defendants point to the concession by the Assistant United States Attorney in *United States v. De la Mata*, 92-230-CR-Marcus, that Judge Moore was the "focus" of the investigation in November 1992. See Transcript, April 6, 1994, pp. 51-52. The government responds that the prosecutor simply argued that even if the court accepted the defendants' characterization of Judge Moore as the "focus" of the investigation, the United States was still entitled to a denial of the motion for new trial. However, the facts are now uncontested that Judge Moore was interviewed by federal agents in November and told that he was a subject of the investigation. The arguments relating to the "focus" comment are unnecessary, and the court's decision is not based on this concession by the Assistant United States Attorney.

The defendants also view Judge Moore's ultimate recusal in a different light than the government. The defendants contend that because Judge Moore recused him-

self only when the public became aware of the investigation in October of 1993, and not when Judge Moore himself first learned of the investigation in November of 1992, his impartiality is called into question. This behavior, the defendants ague, would cause the average lay person to have doubts as to his impartiality. Furthermore, the defendants emphasize that Judge Moore was told that he was a target of the investigation on October 6, 1993. However, he did not recuse himself until October 15, 1993, nine days after being told he was a target. With the press reports of October 11 identifying Judge Moore as the Marshals official under investigation by the government, the defendants claim that they would have moved to have Judge Moore recused if he had not done so himself.

II. When Should Recusal Have Occurred

A. The Standards Established by *Liljeberg*

Congress amended the Judicial Code in 1974, changing the standard of recusal for judges to an objective one. The earlier statute called upon a federal judge to recuse himself if, "in his opinion," it would be improper for him to hear the case. *See Liljeberg*, 486 U.S. at 870-71, n. 1, 108 S.Ct. at 2208, n. 1 (Rehnquist, C.J., dissenting). Today, § 455 is violated if the general public could reasonably believe that a judge knows of disqualifying facts or in other respects believes that there would be an appearance of impropriety. *Liljeberg*, 486 U.S. 847, 108 S.Ct. 2194 (1988). In *Liljeberg*, Judge Collins was the district court judge in a civil law suit between John Liljeberg and St. Jude Hospital of Kenner, Louisiana. Judge Collins ruled in favor of Liljeberg in the litigation. Later, it was discovered that Judge Collins had been a member of the Board of Trustees of Loyola University while Liljeberg was negotiating to purchase a parcel of land on

which to construct a hospital. "The success and benefit to Loyola of these negotiations turned, in large part, on Liljeberg's prevailing in the litigation before Judge Collins." *Liljeberg*, 486 U.S. at 850, 108 S.Ct. at 2198. The Supreme Court conducted an analysis of the facts and the particular conflict in the case. The Court assumed that Judge Collins did not have actual knowledge of Loyola's interest in the dispute over the ownership of St. Jude and its certificate of need.[4]

The Court found it important to "identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality." *Id.* at 865, 108 S.Ct. at 2205. *See also U.S. v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) (recognizing that the situation that could bear on the issue of bias or prejudice is to be viewed through the eyes of an objective person). The Supreme Court found it "remarkable" and "inexcusable" that Judge Collins did not recuse himself when he learned of his financial interest in the subject matter of the controversy before him. The Court found this behavior to be a violation of § 455(b)(4). Judge Moore did recuse himself as soon as it became public knowledge that he was a target of the investigation. However, he did not recuse himself when he was told that he was a subject of the investigation and was interviewed by two federal agents.

The distinction between being a subject of an investigation or a target of an investigation, which the government argues, is a weak basis for distinguishing this case from *Liljeberg*. It does seem a matter of semantics, and, as Judge Moore knew he was being investigated, he should have recused himself. The government contends that this case is different from *Liljeberg* in that Judge Moore's

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[4] Judge Collins was on the Board of Trustees at Loyola and regularly attended such meetings.

position as the subject of a criminal investigation does not give rise to any obvious sympathy for one party or the other. The government contends that any bias Judge Moore had would not tilt towards the prosecution. Judges who have been charged with criminal misconduct in previous cases have been obliged to recuse themselves because of a claimed heightened sympathy for defendants. *See United States v. Jaramillo,* 745 F.2d 1245 (9th Cir. 1984), *cert. denied,* 471 U.S. 1066, 105 S.Ct. 2142, 85 L.Ed.2d 499 (1985).

The majority of cases that address recusal in the Eleventh Circuit stem from civil cases. Our circuit has stated that "[a] judge should disqualify himself only if a reasonable person would question his impartiality. . . ." *Giles v. Garwood,* 853 F.2d 876 (11th Cir. 1988), *cert. denied,* 489 U.S. 1030, 109 S.Ct. 1164, 103 L.Ed.2d 222 (1989). The court finds the reasoning for recusal in civil cases just as compelling, if not more so, in criminal matters. In a criminal case, it is the government, with its great array of resources, that must prove that the defendant is guilty of the alleged crime. Any appearance that the case against the defendant is unfair or impartial may call into question his constitutional rights to a fair trial. *See Potashnick v. Port City Constr. Co.,* 609 F.2d 1101, 1111 (5th Cir.), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980) ("any question of a judge's impartiality threatens the purity of the judicial process and its institutions.")

In *Jaramillo,* the court found that when a federal judge learned of his own indictment he properly disqualified himself in the middle of a jury trial. *Jaramillo,* 745 F.2d at 1248. Although the judge's indictment in that case triggered his disqualification, the defendants argue that an investigation may create as much, if not more, reason to question a judge's impartiality. The defendants' line of

reasoning is that once an indictment has been returned, a decision has already been made by the government to publicly press charges. The pendency of an investigation inherently means that no such decision has been etched in stone and, thus, could potentially be influenced.

Whether Judge Moore did in fact attempt to curry favor is not the issue here, nor will this court assume that he acted in anything other than a professional manner in the defendants' trials. However, the rules governing conflicts are designed to prevent the reasonable possibility of prejudice. Section 455(a) is designed to "promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865, 108 S.Ct. at 2205.

B. The Strong Mandatory Language of Section 455(a)

The government is using the wrong standard in focusing on what Judge Moore knew about the meaning of words such as target and subject of an investigation. The standard adopted by this circuit and the Supreme Court, and agreed to by the government in this case, is what an individual mecber of the public would know about the distinction between being a subject of an investigation versus a target of an investigation. The common meaning of those words to an objective, disinterested lay observer is that te individual is being investigated by the government. There is no distinction in the common use of the words subject and target.

The government next argues that it was technically impossible for Judge Moore to influence the United States Attorney's Office in New York. Public officials, such as judicial officials, who come under scrutiny by the government are often investigated bv the Public Integrity Section of the Department of Justice. The court can accept for

the purposes of this decision that any rulings made by Judge Moore in Miami cases could have no impact on the grand jury investigation in New York and/or on Public Integrity investigations in Washington, D.C. However, the inquiry into one's ability to influence an investigation is not the inquiry mandated by the law. Section 455(a) does not ask whether it is possible to exert one's influence but instead asks whether one's impartiality might reasonably be questioned. This court finds that an objective lay observer would have questioned Judge Moore's impartiality.

Section 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice. The statute does not give a judge discretion as to whether to recuse himself but states that a judge "shall disqualify himself in any proceeding in which his impartiality might be questioned." 28 U.S.C. § 455(a) (emphasis added). The statute does not allow a judge to disqualify himself if he thinks he could be affected by external matters, such as being close frineds with a witness or being under investigation. Rather, the statute tells him to disqualify himself if the public may perceive him, or his rulings, as being affected. *See U.S. v. Kelly*, 888 F.2d 732, 744-45 (11th Cir. 1989) (holding that the district court judge should have recused himself as his spouse was a friend of the defense witness' wife). Thus, "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." *Potashnick*, 609 F.2d at 1111 (1980). Section 455(a) requires judges to resolve any doubts they may have as to whether they should hear a case in favor of disqualification.

It seems clear to this court that the average person on the street will believe that if a federal judge is the subject of a pending grand jury investigation, then that individual

cannot conduct criminal trials impartially. Any member of the public, upon hearing that someone is a subject of an investigation, is going to believe that the individual is being investigated. In fact, while one is a subject and has not yet been indicted, the public could perceive that there is even more temptation to try to avoid the indictment by using whatever influence possible. After an indictment has been issued, it is too late to try to convince the government no to indict.

The parties agree that Judge Moore was the subject of a grand jury investigation as of November 11, 1992. The parties agree that the standard for applying 28 U.S.C. § 455(a) is that of the objective lay person. The parties agree that it was appropriate for Judge Moore to recuse himself at some point during the investigation; they only disagree as to when this recusal should have occurred. The issue, thus, is whether § 455(a) required Judge Moore to recuse himself at an earlier date. This court finds, for the above stated reasons, that it does. The court will not deal in vague nuances of words and their meanings. "Quite simply and quite universally, recusal [is] required whenever 'impartiality might reasonably be questioned.'" *Liteky v. United States,* 510 U.S. 540, ——, 114 S.Ct. 1147, 1154, 127 L.Ed.2d 474 (1994). When a member of the federal judiciary is under criminal investigation, he should recuse himself from hearing criminal matters, as the public might perceive him to be biased.

C. Is a New Trial Necessary

The government argues that even if Judge Moore erred by failing to disqualify himself, such error was harmless. *See Parker v. Connors Steel Co.,* 855 F.2d 1510, 1525-26 (11th Cir. 1988), *cert. denied,* 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989). In determining whether a judgment should be vacated for a violation of

Co., 855 F.2d 1510 (11th Cir. 1988), the Eleventh Circuit did not find it necessary to order reassignment of the case where a judge relied on a law clerk for assistance in resolving a summary judgment motion when the law clerk was associated with one of the parties to the dispute. The court noted that any harm to public confidence had already occurred and granting relief would not change the public's perception.

The court's holding in *Parker* can be distinguished from these cases. In *Parker,* the Eleventh Circuit had already reviewed the summary judgment decision and found it proper. Thus, the court concluded that the public would "lose faith in our system of justice because the case will be overturned without regard to the merits of the . . . claims." *Parker,* 855 F.2d at 1527. In this case there has been no ruling on appeal to the Eleventh Circuit. The defendants' individual complaints have not been addressed.

In another case, the court found that the judge's involvement as a private lawyer in the disputed evidentiary facts of a case before him should have resulted in his recusal under § 455(b). *U.S. v. Alabama,* 828 F.2d 1532 (11th Cir. 1987), *cert. denied,* 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988). While the subsection for recusal is different, it is important to note that the court found a retrial necessary, even though it would come at great expense in terms of time, energy and legal fees. *Id.* at 1545-46. *See also U.S. v. Kelly,* 888 F.2d 732, 744 (11th Cir. 1989) (new trial was ordered).

This court does not rule on any of the individual decisions made by Judge Moore during the course of the trial. The defendants' arguments that some of the discretionary rulings made in the government's favor by Judge Moore risk injustice to the parties does not factor into this court's

decision. The court has no doubt that the third factor identified by the Supreme Court in *Liljeberg* is sufficient by itself to warrant a new trial. Public confidence in the judiciary is the foundation for our entire system of justice and cannot be abused or dismissed lightly.

Federal Rule of Civil Procedure 60(b)(6) authorizes a district court, on motion and upon such terms as are just, to relieve a party from a final judgment for any "reason justifying relief from the operation of the judgment." This case is an extraordinary circumstance and, with this decision as precedent, should not occur again. Although the finality of judgments is to be preserved, in this instance the court cannot run the risk that the reputation of the justice system may be tarnished. The court will thus grant a new trial to the defendants in this case.

CONCLUSION

For the above discussed reasons, the court hereby GRANTS defendants' motions for new trial. All other matters can be addressed by the judge to whom this case is otherwise assigned.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
OCT 7 1999
OFFICE OF THE CLERK

(2)

No. 99-125

In the Supreme Court of the United States

FRED DE LA MATA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled to new trials or new sentencing proceedings because the district judge who presided over their criminal cases did not recuse himself under 28 U.S.C. 455(a) when he learned that he was a "subject" of a federal grand jury investigation in another district.

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In the Supreme Court of the United States

No. 99-125

FRED DE LA MATA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-20a) is reported at 172 F.3d 806. The earlier opinion of a panel of that court (Pet. App. 21a-38a) is reported at 139 F.3d 847. The opinion of the district court granting petitioners' motions for new trials (Pet. App. 55a-71a) is reported at 869 F. Supp. 1574. The district court's opinion denying the government's motion for reconsideration (Pet. App. 39a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1999. The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are 29 criminal defendants who were tried before or sentenced by Judge K. Michael Moore of the United States District Court for the Southern District of Florida between November 11, 1992 (the date on which Judge Moore learned that he was a "subject" of a federal grand jury investigation in another district), and October 15, 1993 (the date on which Judge Moore recused himself from all cases in which the government was a party). The district court held that Judge Moore's failure to recuse himself on November 11, 1992, violated 28 U.S.C. 455(a), which provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and granted each petitioner a new trial or a new sentencing hearing as a remedy for that violation. Pet. App. 55a-71a. A panel of the court of appeals affirmed. *Id.* at 21a-38a. The court of appeals, sitting en banc, reversed. *Id.* at 1a-20a.

1. In February 1992, Judge Moore began his tenure as a United States District Judge after having served for two years as the Director of the United States Marshals Service. He had previously been the United States Attorney for the Northern District of Florida. Pet. App. 44a; Gov't C.A. Br. 7.

On November 11, 1992, Judge Moore learned that he was a subject of a grand jury investigation in the Eastern District of New York. Two federal agents informed Judge Moore that the grand jury was investigating allegations that the principals of Central Security Systems, Inc. (CSSI) had paid bribes to Marshals Service employees in order to obtain a contract to provide security services at various federal courthouses. The agents questioned Judge Moore about gifts that he

received from two CSSI officers—meals, tickets to a play and a baseball game, and the use of a limousine—during a visit to New York City while he was the Director of the Marshals Service. The agents also served Judge Moore with a grand jury subpoena for his financial records. When Judge Moore asked whether he was a "target" of the investigation, the agents told him that he was not a "target" but that he was a "subject," as described in the *United States Attorney's Manual*. Pet. App. 44a-46a; Gov't C.A. Br. 7-10.[1]

Between November 1992 and October 1993, Judge Moore had no significant contacts with those involved in the grand jury investigation. During that time, he presided over 93 criminal cases, including 25 trials. He also conducted sentencing hearings for 130 defendants. Pet. App. 47a; Gov't C.A. Br. 10-11.[2]

On October 6, 1993, the United States Attorney's Office in the Eastern District of New York informed Judge Moore that he had become a "target" of the grand jury investigation. On October 15, 1993, Judge Moore recused himself from all pending cases in which

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[1] A "subject" of a grand jury investigation is "a person whose conduct is within the scope of the grand jury's investigation." *United States Attorney's Manual* § 9-11.151 (Sept. 1997). A "target" is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." *Ibid.*

[2] Until October 1993, the United States Attorney's Office in the Southern District of Florida was unaware of Judge Moore's meeting with the agents on November 11, 1992, and his status as a subject of a grand jury investigation. Gov't C.A. Br. 11.

the government was a party. Pet. App. 46a-47a; Gov't C.A. Br. 10-11.[3]

2. In early 1994, petitioners moved for new trials, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, based on Judge Moore's failure to recuse himself when he learned that he was a subject of the grand jury investigation. Each petitioner had been convicted after a jury trial presided over by Judge Moore between November 11, 1992, and October 6, 1993, or had been sentenced by Judge Moore during that period, or both. Pet. App. 7a, 29a.

The district court held that Judge Moore violated 28 U.S.C. 455(a) by not recusing himself on November 11, 1992, the date on which he learned that he was a subject of the grand jury investigation. Pet. App. 65a-69a.[4] The court reasoned that "[w]hen a member of the federal judiciary is under criminal investigation, he should recuse himself from hearing criminal matters, as the public might perceive him to be biased." *Id.* at 69a.

The district court also held that each defendant was entitled to a new trial or a new sentencing hearing as a remedy for Judge Moore's violation of 28 U.S.C. 455(a). Pet. App. 69a-71a. The court found support for its holding in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), which identified three factors bearing on whether a judgment should be vacated for a violation of 28 U.S.C. 455(a): "the risk of injustice to the parties in the particular case, the risk that the

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[3] At the conclusion of the grand jury investigation, no indictment was returned against Judge Moore. He has since resumed all of his judicial responsibilities. Pet. App. 47a; Gov't C.A. Br. 11.

[4] After all of the judges of the Southern District of Florida recused themselves, the cases were assigned to Chief Judge William C. O'Kelley of the Northern District of Georgia. Pet. App. 55a.

denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process," *id.* at 864. The court concluded that "the third factor identified by the Supreme Court in *Liljeberg* is sufficient by itself to warrant a new trial," because "[p]ublic confidence in the judiciary is the foundation for our entire system of justice and cannot be abused or dismissed lightly." Pet. App. 71a. The court did not consider the other factors identified in *Liljeberg*, such as whether any of Judge Moore's rulings created a risk of injustice to any particular defendant.

The government moved for reconsideration, arguing that Judge Moore was not required to recuse himself during the period when he was only a subject, and not a target, of the grand jury investigation. After an evidentiary hearing at which Judge Moore testified, the district court denied the motion. Pet. App. 39a-54a. The court reasoned that, "[n]otwithstanding Judge Moore's familiarity with the subject/target/witness distinctions in the grand jury context, as set forth in the United States Attorneys' Manual, it cannot be credibly argued that these distinctions are readily apparent to the average lay person." *Id.* at 51a. In addition, the court again concluded that each defendant was entitled to the remedy of a new trial or a new sentencing hearing, observing that "[i]t is the third consideration in *Liljeberg* which is of paramount importance in these cases." *Id.* at 53a.

3. A panel of the court of appeals affirmed. Pet. App. 21a-38a. The panel held that the district court did not err in ruling that Judge Moore was required to recuse himself when he learned that he was a subject of a grand jury investigation. The panel reasoned that the determination whether Judge Moore's "impartiality might reasonably be questioned," within the meaning of

28 U.S.C. 455(a), could not be based on "technical knowledge," such as the difference between a subject and a target of an investigation, or on "subjective facts known only to Judge Moore," such as that he had no role in the award or renewal of the CSSI contracts. Pet. App. 35a. The panel also rejected the government's reliance on a protocol concerning the recusal of judges, which was adopted by the Eleventh Circuit Judicial Council while the appeal was pending, to support its argument that a judge is not required to recuse himself upon becoming a subject of a grand jury investigation.[5] The panel stated that the protocol

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[5] On September 5, 1996, the Eleventh Circuit Judicial Council adopted a protocol concerning the recusal of judges that provides, in pertinent part:

> **Standard 1: Notice Required.** Federal judicial officers (circuit judges, district judges, magistrate judges and bankruptcy judges) are required to inform the chief judge of their district and the chief judge of their circuit whenever they have been indicted, arrested or informed that they are the subject or target of a federal or state criminal investigation for a crime punishable by imprisonment of one year or more. * * *
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> **Standard 3: Federal Arrest or Investigation.** Judicial officers who are implicated in a federal criminal process by way of arrest, or who are informed that they are the subject or target of a federal criminal investigation for a crime that is punishable by imprisonment of one year or more may continue with their criminal and civil dockets and administrative duties until the Judicial Council determines to adopt limitations that the nature of the investigation and charges justify. * * *

Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Event of Arrest, Indictment, or Possible Criminal Investigation* (Sept. 5, 1996); see Pet. App. 35a-36a; Gov't C.A. Br. 40-42 & App. D.

"do[es] not bar a requirement for recusal" when a judge learns that he is a subject of a grand jury investigation "should the facts and circumstances so dictate." *Id.* at 36a.

The panel also upheld the district court's remedy of a new trial or a new sentencing hearing for each defendant. Pet. App. 36a-38a. The panel rejected the government's argument that the district court should have analyzed each case separately to determine whether a particular defendant might have been prejudiced by Judge Moore's failure to recuse himself. *Id.* at 36a-37a. The panel, after noting that the district court's "decision as to a remedy here was based solely on the third factor of *Liljeberg*" (*i.e.*, to "promote public confidence in the integrity of judicial process"), affirmed the remedy "[o]n this basis." *Id.* at 37a (quoting *Liljeberg*, 486 U.S. at 858 n.7).

4. The court of appeals vacated the panel's opinion and granted rehearing en banc. 161 F.3d 652 (1998).

The court of appeals was equally divided with respect to whether Judge Moore violated 28 U.S.C. 455(a) by not recusing himself on November 11, 1992. Pet. App. 9a. As a result, the district court's ruling that Judge Moore violated Section 455(a) was affirmed. See *id.* at 9a-10a & n.6.

The court of appeals, however, reversed the district court's ruling that each defendant was entitled to a new trial or a new sentencing hearing as a remedy for the Section 455(a) violation. Pet. App. 10a-20a. The court, after considering the three factors set forth in *Liljeberg*, concluded that such a remedy was not warranted here.

As for the first *Liljeberg* factor, which considers "the risk of injustice to the parties in the particular case," 486 U.S. at 864, the court of appeals found that the

defendants had not met their burden of identifying "particular circumstances indicating a risk of injustice to them" as a result of Judge Moore's presiding over their cases. Pet. App. 13a. The court found that the government, in contrast, had met its burden of establishing that the remedy of providing new trials to the defendants posed a "significant risk of injustice" to the government. *Id.* at 15a-16a. The court noted that "[t]he Government certainly would spend significant amounts of time and money in retrying each of these defendants"—resources that necessarily "would have to be diverted from other cases with the ultimate result that some crime will go unpunished." *Id.* at 15a. The court added that the government would face particular difficulties retrying some defendants, more than five years after their original trials, because of the complexity of their cases and the possible unavailability of witnesses. *Id.* at 15a-16a. The court also found that the government had demonstrated a less substantial risk of injustice in those prosecutions in which the remedy was only resentencing. *Id.* at 16a.[6]

As for the second *Liljeberg* factor, which considers "the risk that the denial of relief will produce injustice in other cases," 486 U.S. at 848, the court of appeals found that "the Eleventh Circuit Judicial Council has already minimized the risk that similar violations will occur in the future" by adopting a protocol to guide judges who become a subject or a target of a criminal

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[6] The court stated that "the seriousness of the violation of section 455(a)" is also relevant to whether a risk of injustice to the parties exists. Pet. App. 13a. The court concluded that the Section 455(a) violation in this case "was neither egregious nor clear to the judge," *id.* at 14a, and thus militated against the remedy of new trials and new sentencing proceedings.

investigation. Pet. App. 16a. "[I]n light of the recently adopted protocol," the court concluded, "there is little risk that failing to vacate the defendants' convictions in these cases will promote injustice in other cases." *Id.* at 20a.

As for the third *Liljeberg* factor, which considers "the risk of undermining the public's confidence in the judicial process," 486 U.S. at 848, the court of appeals found that ordering new trials and new sentencing hearings for all of the defendants would "increase[] rather than decrease[] that risk." Pet. App. 18a. The court explained that "the public would lose confidence in the judicial process if the judgments were vacated, because the parties and courts would be forced to relitigate the case[s] even though the proceedings leading to those judgments seemed completely fair." *Ibid.* "Without any specific indication that the outcome in the trial court could have been tainted by bias," the court added, "the public would most likely find it unjust to require the Government to suffer [the] costs" of retrying and resentencing all of the defendants. *Ibid.*

The court of appeals thus concluded that the three *Liljeberg* factors, taken together, "weigh[ed] strongly against vacatur in regard to the defendants who received new trials." Pet. App. 19a. The court further concluded that those factors "weigh[ed] against vacatur, albeit less strongly, in regard to the cases in which [the district court] granted only a new sentencing hearing." *Id.* at 20a. Accordingly, the court reversed the orders granting new trials and new sentencing hearings. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 10-24) that they are entitled to new trials or new sentencing hearings as a remedy

for Judge Moore's violation of 28 U.S.C. 455(a). The court of appeals correctly rejected that contention, and this Court's review is not warranted.

1. Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988), this Court recognized that, "[a]lthough § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty."[7] The Court went on to state that "in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id.* at 864. The Court thus made clear that not all violations of Section 455(a) require vacatur of the judgment.

Here, the court of appeals correctly concluded that the district court erred in vacating the judgments against petitioners based only on the third *Liljeberg* factor. Pet. App. 10a-11a. Moreover, after analyzing all three *Liljeberg* factors, the court of appeals correctly concluded that vacatur of those judgments was not an appropriate remedy in the circumstances of this case. *Id.* at 11a-20a. A lower court's application of an established legal standard, such as that set forth in *Liljeberg*,

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[7] In *Liljeberg*, a civil case, the Court ruled that Section 455(a) required the recusal of a judge who sat on a university board that stood to be affected financially by the resolution of a case pending before him. 486 U.S. at 862-870.

to a particular set of facts ordinarily does not merit this Court's review. See Sup. Ct. R. 10.

Petitioners' contention (Pet. 12-19) that the court of appeals misapplied *Liljeberg* by employing a "cost-benefit" analysis rests primarily on two misunderstandings of the decision below. First, contrary to petitioners' assertion (Pet. 14), the court did not hold that the "time and money" that would be required to retry the case or cases at issue is dispositive in determining the appropriate remedy for a Section 455(a) violation. The court simply recognized that the first *Liljeberg* factor—"the risk of injustice to the parties in the particular case," 486 U.S. at 864—requires consideration of "not only the risk of injustice to the parties from any potential partiality or bias on the part of the judge, but also the risk of injustice posed by the remedy of vacatur itself." Pet. App. 11a; see *Liljeberg*, 486 U.S. at 868 (weighing the "risk of unfairness in upholding the judgment" against that of "depriv[ing] the prevailing party of its judgment"). In evaluating the latter risk, the court did conclude that "[t]he Government certainly would spend significant amounts of time and money in retrying each of these [petitioners]." Pet. App. 15a.[8] The court, however, weighed that risk of injustice to the government against the countervailing risk of injustice to

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[8] The court of appeals did not limit its evaluation of the risk of injustice posed by the remedy of vacatur solely to the economic cost to the government of providing retrials. The court also pointed out that "[r]esources devoted to retrial in all of these cases would have to be diverted from other cases with the ultimate result that some crime [would] go unpunished." Pet. App. 15a. The court also observed that "the long delay between [petitioners'] original and new trials could seriously compromise the Government's ability to re-prosecute [petitioners] effectively." *Ibid.*

petitioners if the judgments were allowed to stand. *Id.* at 19a-20a. Because petitioners had "not pointed out any particular circumstance indicating a risk of injustice to them," the court permissibly determined that the first *Liljeberg* factor weighed against the remedy of vacatur. *Id.* at 13a.

Second, also contrary to petitioner's assertion (Pet. 17-18), the court of appeals did not "collapse[] the 'appearance' standard [of Section 455(a)] into an 'actual bias' test," under which "a defendant must prove that a judge is actually biased in order to obtain meaningful relief under § 455(a)." In applying the first *Liljeberg* factor, the court merely required that a party seeking vacatur show "that potential bias on the part of the judge presented a risk of injustice to it." Pet. App. 12a. The court made clear that "the party seeking vacatur is not required to prove that the judge's potential bias actually prejudiced it." *Ibid.* Moreover, the court expressly "[left] open the possibility that in a rare case involving an extremely serious violation of section 455(a), a court might find that the party seeking vacatur has carried its burden under the first *Liljeberg* factor, even if the party has pointed to no particular circumstances indicating a risk of injustice." *Id.* at 14a. But the court found that "this is not such a case." *Ibid.*

At bottom, petitioners' argument reduces to the claim (Pet. 16-17) that a criminal defendant is automatically entitled to a new trial or a new sentencing hearing for a violation of Section 455(a). See Pet. App. 13a n.12 (noting that petitioners "attempted to prevail on either an automatic vacatur or bias *per se* theory, or by focusing on the third *Liljeberg* factor alone" in the courts below). *Liljeberg* expressly rejects such a categorical rule in the civil context. See 486 U.S. at 864 (observing that vacatur is "neither categorically avail-

able nor categorically unavailable for all § 455(a) violations"). The same case-by-case approach to the remedial question that the Court mandated in *Liljeberg* is equally appropriate in the criminal context. See *id.* at 862 (recognizing that, because the court of appeals "is in a better position to evaluate the significance of a violation" of Section 455(a) in any particular case, "[i]ts judgment as to the proper remedy should thus be afforded our due consideration").

2. Petitioners also assert (Pet. 19-24) that this Court's "structural error" cases require vacatur of the judgment in any criminal case in which a violation of Section 455(a) occurred. That claim, which the court of appeals did not even address, is without merit.

Since *Chapman* v. *California*, 386 U.S. 18 (1967), this Court "has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). In a "very limited class of cases," however, the Court has found that a constitutional violation constituted a "structural error" that required automatic reversal. *Johnson* v. *United States*, 520 U.S. 461, 468 (1997). The Court has identified a financially interested trial judge, as involved in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), as one such constitutional violation that amounts to a "structural error." See, *e.g.*, *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999); *Johnson*, 520 U.S. at 468-469; *Fulminante*, 499 U.S. at 309-310. In *Tumey*, the Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion

against him in his case." 273 U.S. at 523. See also *Ward* v. *Village of Monroeville*, 409 U.S. 57, 59-60 (1972).[9]

Contrary to petitioners' contention (Pet. 21), the court of appeals' decision in this case does not conflict with *Tumey* and *Ward*. Unlike those cases, this case does not involve a judge who committed a constitutional violation by presiding over a case in which he had "a direct, personal, substantial pecuniary interest in reaching a conclusion against" the defendants. *Tumey*, 273 U.S. at 523. Rather, this case involves a judge who was found to have committed only a statutory violation by not recusing himself when "his impartiality might reasonably be questioned," 28 U.S.C. 455(a)—a violation that the court of appeals unanimously agreed was "neither egregious nor clear to the judge" given the existing state of the law. Pet. App. 14a. As the Court recognized in *Tumey*, "[a]ll questions of judicial qualification may not involve constitutional validity"; instead, "matters of kinship, personal bias, state policy, [and] remoteness of interest would seem generally to be matters merely of legislative discretion." 273 U.S. at 523; see *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 821 (1986) ("only in the most extreme of cases would disqualification on [the] basis [of bias or prejudice] be constitutionally required"). Judge Moore's failure to recuse himself thus does not amount to a

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[9] *Tumey* and *Ward* both involved mayors who acted as judges in cases involving local offenses and who had direct financial stakes in the fines levied by their courts. In *Tumey*, the mayor personally received, in addition to his salary, a portion of the fees and costs that he levied on violators. 273 U.S. at 522-523. In *Ward*, the mayor was responsible for the village's finances, and the fines, forfeitures, costs, and fees levied by his court provided as much as half of the village's annual income. 409 U.S. at 58.

constitutional violation, much less to a "structural error" that requires automatic reversal.[10]

3. Petitioners are also mistaken in claiming (Pet. 23) that the court of appeals' decision "has exacerbated a split in the circuits concerning the proper construction of *Liljeberg* in criminal cases." Other circuits, like the Eleventh Circuit in this case, have looked to *Liljeberg* for guidance in determining the appropriate remedy when a trial judge violates Section 455(a) in a criminal case. See, *e.g.*, *United States* v. *Jordan*, 49 F.3d 152, 158 (5th Cir. 1995) ("We hold that a violation of Section 455(a) does not automatically require a new trial.") (citing *Liljeberg*, 486 U.S. at 862); *United States* v. *Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994) ("[W]e must specifically consider whether the judge's violation of section 455(a) is harmless error that does not

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[10] Petitioners erroneously assert (Pet. 21-22) that the Court in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), found a "structural error" in a case not involving a constitutional violation. Petitioners rely only on Justice Brennan's plurality opinion, which did reason that the appointment of counsel for an interested party as a contempt prosecutor was not subject to harmless error analysis. See *id.* at 810-811 (opinion of Brennan, J.). But Justice Scalia, who provided the crucial fifth vote in that case, did not join in that reasoning; he instead rested his vote on the "more fundamental" ground that district courts lack the authority to appoint counsel to prosecute contempt. *Id.* at 815, 825 (Scalia, J., concurring in judgment). Justice Powell, in an opinion joined by the Chief Justice and Justice O'Connor, expressly took issue with the plurality's refusal to apply harmless error analysis. *Id.* at 826 (Powell, J., concurring in part and dissenting in part); see also *id.* at 827 (White, J., dissenting) (concluding that "there was no error, constitutional or otherwise, in the appointments made in this action"). A majority of the Court thus did *not* hold, as petitioners claim, that the non-constitutional error in *Young* was a "structural" one.

warrant setting aside [the defendant's] sentence.") (citing *Liljeberg*, 486 U.S. at 862); *United States* v. *Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989) ("[I]f a judge violates § 455(a) 'there is surely room for harmless error.'") (quoting *Liljeberg*, 486 U.S. at 862).

The Third Circuit's decision in *United States* v. *Antar*, 53 F.3d 568 (1995), is not to the contrary. In that case, the trial judge handled concurrent criminal and civil proceedings involving allegations of securities fraud against the defendants. Based on comments that the judge made at the sentencing hearing, the Third Circuit ruled that the judge's failure to recuse himself under Section 455(a) constituted plain error. *Id.* at 572-579. In reversing the convictions and remanding for a new trial under the plain error standard, the Third Circuit did indicate that it was not necessary to find that the failure to recuse had an effect on the outcome of the case, because "once the appearance of partiality is shown, prejudice is presumed." *Id.* at 573 n.7. But the court did not discuss this Court's decision in *Liljeberg* or indicate why that decision would not provide the applicable frame of reference in fashioning the remedy. See *id.* at 579. Moreover, *Antar* was an unusual case in which the court of appeals found that "the district judge, in stark, plain and unambiguous language, told the parties [at the sentencing hearing] that his goal in the criminal case, from the beginning, was something other than what it should have been and, indeed, was improper." *Id.* at 576; see *id.* at 575 (noting that the case was "different * * * from nearly all the reported recusal cases we have come across"). *Antar* does not foreclose the Third Circuit from applying the *Liljeberg* factors in future cases to determine the appropriate remedy for a violation of Section 455(a).

4. Finally, this case is not an optimal vehicle in which to decide whether a criminal defendant is automatically entitled to a new trial or a new sentencing hearing as a remedy for a Section 455(a) violation. In order to reach that question, the Court would first have to decide whether Judge Moore did, in fact, violate Section 455(a), a question on which the court of appeals was evenly divided. Pet. App. 9a-10a.[11] A finding of no violation would be a basis for supporting the judgment below. It is thus quite possible that the Court would have no occasion in this case to decide the question on which petitioners seek review.

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[11] A determination that Judge Moore did not violate Section 455(a) by failing to recuse himself from criminal cases when he learned that he was a subject of a grand jury investigation would be consistent with the model policy adopted by the Judicial Conference of the United States during the pendency of this case. The model policy provides that, if a federal judge is indicted on a felony charge, his criminal cases are to be reassigned. But a judge may continue to preside over criminal cases even after being informed that he is the target of a federal grand jury investigation unless his judicial council determines otherwise. Report of the Proceedings of the Judicial Conference of the United States 87 (Sept. 19, 1995) (Gov't C.A. App. C); Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Event of Arrest, Indictment, or Possible Criminal Investigation* (Sept. 5, 1996) (Gov't C.A. App. D). It necessarily follows that a judge who is only a subject, and not a target, of a grand jury investigation may continue to preside over criminal cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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